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THE

LAWS OF INSURANCE:

FIRE, LIFE, ACCIDENT, AND GUARANTEE.

RELEASED BY THE
LAW SOCIETY OF B.C. 1952

EMBODYING

CASES IN THE ENGLISH, SCOTCH, IRISH, AMERICAN, AND CANADIAN COURTS.

BY

JAMES BIGGS PORTER,

OF THE INNER TEMPLE AND SOUTH-EASTERN CIRCUIT, BARRISTER-AT-LAW;
HOLDER OF THE FIRST PRIZE (1873) IN EQUITY AND REAL PROPERTY.

ASSISTED BY

WILLIAM FEILDEN CRAIES, M. A.,

OF THE INNER TEMPLE AND WESTERN CIRCUIT, BARRISTER-AT-LAW.

FROM THE SECOND (1887) EDITION.

WITH NOTES AND AMERICAN CASES

BY

HENRY DARRACH, Esq.,

OF THE PHILADELPHIA BAR.

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TO

THE HONOURABLE

SIR WILLIAM GRANTHAM, KNIGHT,

ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT OF JUSTICE.

THIS EDITION OF A MANUAL ON

THE LAWS OF INSURANCE

IS, WITH PERMISSION,

Respectfully Dedicated

BY

THE AUTHOR.

July 1867.

NOTE.

We suggest to our patrons that, to facilitate the labor of the Judges and Reporters, they cite the TOP PAGING of books of our SERIES, and add [TEXT BOOK SERIES.]—*Editor.*



PREFACE TO THE SECOND EDITION.

In my Preface to the First Edition, I mentioned that, none of the English writers on the Law of Insurance having treated in one volume of Life, Fire, and Accident Insurance, and important principles of the Law—such as Subrogation and Indemnity—having been much elucidated by recent decisions, it seemed to me that a book of moderate size, containing in one volume the whole Law of Insurance (excepting Marine)—viz., *Life, Fire, Accident, and Guarantee Insurance*—might be for the convenience of the profession.

This anticipation was not, it is hoped, entirely mistaken, for the First Edition was taken up sooner than was expected. Notwithstanding, however, the comparatively short time that has elapsed since the book was published, numerous fresh cases have occurred in this country, Scotland, Ireland, the Colonies, and America; and those which I considered the most useful of them, numbering over 160, have been referred to in this

Edition, bringing up the list of cases to upwards of 1560.

As the American and Colonial Reports are numerous, and their abbreviations are not always familiar to the English reader, a list of such abbreviations has been given; and the statutes alluded to will be found in the Index.

J. B. P.

INNER TEMPLE,
July 1887.

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LIST OF ABBREVIATIONS

BY WHICH AMERICAN AND COLONIAL REPORTS, &c., ARE REFERRED TO IN THIS WORK.

Ala.	=	Alabama Reports.
All. (New Bruns.)		Allen's New Brunswick Reports.
Amp. Rep.		American Reports.
Angell Insur.		Angell on Insurance.
Barb. N. Y.		Barbour's Reports, Supreme Court New York.
Bissell, U. S. C. Ct.		Bissell's Reports, United States Circuit Court.
Bliss Life Ins.		Bliss on Life Insurance.
Blatchford, U. S.		Blatchford's Circuit Court Reports, United States.
Bush, Ky.		Bush's Reports, Kentucky.
Cape (East Distr.) Rep.		Cape of Good Hope Eastern District Reports.
Can. S. C		Canada Supreme Court Reports.
Caines, N. Y.		Caine's Reports, New York.
Conn.		Connecticut Reports.
Cranch, U. S.		Cranch's Reports, United States.
Da. Sup. Ct. U. S.		Davis Reports, Supreme Court United States.
Dill. C Ct. U. S.		Dillon's Reports, Circuit Court United States.
Fed. Rep. (U. S.)		Federal Reports, United States.
Grant, U. C.		Grant's Chancery and Appeal Reports, Upper Canada.
Gratt, Va.		Grattan's Reports, Virginia.
Hall, N. Y.		Hall's Reports, New York.
Hand, N. Y.		Hand's Reports, New York.
Han New Bruns.		Hannay's Reports, New Brunswick.
Holmes, U. S. C. Ct.		Holmes' Reports, United States Circuit Court.
Howard, U. S.		Howard's Reports, Supreme Court United States.
Hughes, U. S. C. Rep.		Hughe's Reports, United States Circuit Court.
Hun, N. Y.		Hun's Reports, New York.
Ill.		Illinois Reports.
Iowa		Iowa Reports.
Johnson, N. Y.		Johnson's Reports, New York.
Kent. Comm.		Kent's Commentaries.
Louis. or La.		Louisiana Reports.
Louis. Ann.		Louisiana Annual.
Lansing, N. Y.		Lansing's Reports, New York.
Lr. Can. Jur.		Lower Canada Jurist.
Lr. Can. Rep.		Lower Canada Reports.

Maine	= Maine Reports.
May Ins.	May on Insurance.
Missouri	Missouri Reports.
Maryland	Maryland Reports.
Mass. Cush.	Cushing's Massachusetts Reports.
Mass. Met.	Metcalfe's Massachusetts Reports.
Mass. Pickering	Pickering's Massachusetts Reports.
Mass. Gray	Gray's Massachusetts Reports.
Mass. Allen	Allen's Massachusetts Reports.
McCrary (U. S. Cir. Ct.)	McCrary United States Circuit Court Reports.
Mich.	Michigan Reports.
Minnesota	Minnesota Reports.
N. H.	New Hampshire Reports.
N. S. W. Law	New South Wales Law Reports.
N. Y. Comst.	Comstock's New York Reports.
N. Y. Sup. Ct. Stanford	Sandford's Reports, New York Supreme Court.
N. Z. Sup. Ct.	New Zealand Supreme Court Reports.
Ontario App.	Ontario Appeals.
Paige, N. Y. Ch.	Paige's Chancery Reports, New York.
Pen.	Pennsylvania Reports.
Peters, U. S.	Peters' Reports United States.
Phil.	Phillips on Insurance.
P. & B., New Bruns.	Pugsley & Burbridge New Brunswick Reports.
Robinson La.	Robinson Louisiana Annual.
Rus. & Gel	Russell & Gelder Nova Scotia Reports.
Russ. & Ch. Nov. Sco.	Russell & Chesley, Nova Scotia Reports.
Stanford, N. Y. Ch.	Sandford's Chancery Reports New York.
Sawyer U. S. C. Ct.	Sawyer's United States Circuit Court Reports.
Sickell N. Y.	Sickell's New York Reports.
Story Agency	Story on Agency.
Story Reports	Story's Reports.
Sum. Rep.	Summer's Reports.
Sans or Sansum	Sansum's Digest.
Stevens Quebec Dig	Stevens' Quebec Digest.
Stuart Lr. Can.	Stuart's Reports Lower Canada.
U. C. Q. B.	Upper Canada Queen's Bench Reports.
U. C. C. P.	Upper Canada Common Pleas Reports.
U. C. Er. & App.	Upper Canada Error and Appeal.
U. S. Otto	Otto's Reports Supreme Court, United States.
Victoria Law	Victoria Law Reports.
Wall.	Wallace's Report, United States.
Wash.	Washington's Reports United States.
Watts & Serj. Penn.	Watts & Serjeant, Pennsylvania.
Wend. N. Y.	Wendell's Reports, New York.
Wis.	Wisconsin Reports.

THE LAWS OF INSURANCE.

CHAPTER I.

NATURE OF THE CONTRACT OF INSURANCE.

Purpose of insurance.—The aim of all insurance is to make provision against the dangers which beset human life and dealings. Those who seek it endeavour to avert disaster from themselves by shifting possible losses on to the shoulders of others who are willing, for pecuniary consideration, to take the risk thereof; and in the case of life insurance, they endeavour to assure to those dependent on them a certain provision in case of their death (*a*), or to provide a fund out of which their creditors can be satisfied.

Those who grant insurance undertake such risks at a price and upon calculations which, if well adjusted, will leave them, after providing against all contingencies, a fair profit on the capital which they adventure. In insurance business there is a tendency, as in all others, to reduce such profit to the lowest margin, and most insurers[1] in effect grant by way of bonus a rebate on the premiums originally demanded, whereby they correct errors in their own favour made in estimating the premiums charged for the risks taken, or make the business of insurance mutual rather than commercial.

Principle of insurance is idemnity.—The controlling principle in insurance law is idemnity, and by reference to that principle most difficulties *arising on insurance contracts must be [* 2] settled (*b*). Except in insurance on life and against accident, which will be presently discussed, the insurer contracts to idemnify the assured for what he actually loses by the happenning of the events upon which the insurer's liability is to arise;

(*a*) 1 Bell Comm. 645 (7th edition).

(*b*) *Castellain* v. *Preston*, 11 Q. B. D. 380 at 386, per Brett, L. J.

[1] This refers strictly to mutual insurance. The principle which lies at the foundation is mutuality, in other words, each member has a voice in the management of the affairs of the company, and participates in the profits and losses of the business.

May on insurance, 2d chap., 25. *Smith* v. *Hunterdon County Mutual F. Ins. Co.*, 41 N. J., eq. 473.

and under no circumstances is the assured in theory entitled to make a profit of his loss (*c*).

Were this not so, the two parties to the contract would not have a common interest in the preservation of the thing insured, and the contract would create a desire for the happening of the event insured against (*d*). And where in fact the assured has a prospect of profit, there and there only can arise the temptation to fraud, or such carelessness as will bring about the destruction of the thing insured.

Indemnity not always complete.—The contract is not, however, necessarily one of perfect indemnity (*e*). No insurer now takes the risk of the destruction of what he insures by all perils whatsoever. As a man of business, he must take a risk which he can estimate, for the two reasons that his capital is not unlimited, and that the reward he receives for his liability must be calculated with some reference to the prospect of his actually incurring the liability. And the insurer not only does not insure against all risks, but will not insure to an unlimited amount. The amount of insurance is controlled—

1. By the value of the thing insured. If, however, the assured is respectable, his valuation of his goods is usually taken; and insurers, if the risk is not great, do not object to over-insure in order to earn a higher premium, since they know that they will only be liable for the actual loss.

[*3] *2. By the general consideration of the insurer's business. Most insurers will not insure above a certain amount on any property or life, and either decline the surplus, or, if they accept it, reinsure their liability thereon with some other insurer, so as to divide the liability thus insured.

Further, the insurer will not insure every form of property nor every interest therein. *Insurable value.*—The contract is in its inception mercantile, and the only value insurable is the commercial value of the thing insured. An insurer will not pay a man's losses at his own price or compensate him for his feelings at the burning of an heirloom, but only for his loss so far as it is estimable in money on ordinary business principles. And there are many kinds of property, such as documents of title and negotiable instruments, which, while of great value in a certain sense, are so only as evidences of title, and as such are not proper subject-matter of insurance, or not insurable on the same calculations as other property.

Extent of insurer's liability.—The insurer, by limiting the amount up to which he insures, does not, except in a valued policy, bind himself absolutely to pay the whole amount if the thing insured is destroyed, and he is not estopped from demanding proof of the

(*c*) Same case. *Vide* also 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*d*) *Warnock* v. *Davis*, 104 U. S. (14 Otto) 775.

(*e*) *Aitchison* v *Lohre*, 4 App. Cas. 755, 49 L. J. Q. B. 128, 41 L. T. N. S 823. 28 W. R. 1.

actual loss caused by the perils insured against. His undertaking is only to indemnify for loss actually suffered not exceeding the amount named in the policy.

Valued policy.—In valued policies[a] (which, though not unlawful, are rare in the case of land insurances on property) (*f*) the value is agreed, and such value is conclusive for all purposes against the insurer, unless he impugns the good faith of the assured in making the valuation (*g*), or shows over-valuation to be *so [*4] great that knowledge thereof would have affected the insurers willingness to take the risk (*h*)

And even where for convenience the value is agreed, proof of loss total or partial must be made to entitle the assured to recover on the contract. Thus it is said in a very early case, that where a policy is granted on the goods of "A." without account, he must prove that his goods were shipped and lost, but not the particulars (*i*).

Results of principle of indemnity.—The consequences of the principle of indemnity are briefly as follow:—

1. Only what has been actually lost need be made good, whether by payment or reinstatement, *i. e.*, restoration of the thing damaged to its original condition, or construction of a new thing similar to it. No more than the amount of loss can be lawfully recovered, and if more is recovered the insurer can get it back again if he paid unawares (*k*).

2. If the thing insured is not totally destroyed, but remains wholly or in part in a deteriorated or damaged condition, the insured can only claim the value of the injury actually done, unless all that remains of the thing insured be surrendered to the insurer. If the assured does not agree to treat the thing as wholly lost to him, he cannot ask to have it wholly made good to him (*l*). This rule, commonly called the doctrine of abandonment, is chiefly applied in marine insurance, but is equally applicable to all insurances on property (*m*.) *The only questions arising [* 5] under it in land insurance are as to what degree of damage will entitle the assured to abandon the property to the insurer, to make what he can of it, and when the insurer can insist on the as-

(*f*) 3 Kent Comm. 375, note d. 2 Phillips, s. 1211 *et seq.* *Wallace* v. *Insurance Co.*, 4 Louisiana O. S. 289.

(*g*) *Baker* v. *Janson*, 16 W. R. 899, L. R. 3 C. P. 303, 37 L. J. C. P. 105.

(*h*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531, 43 L. J. Q. B. 227, 30 L. T. N. S. 547, 22 W. R. 884.

(*i*) *Williams* v. *North China Insurance Co.*, 1 C. P. D. 757, 765, 35 L. T. N. S. 884. *Kains* v. *Knightly*, Skinner 54.

(*k*) See *Darrell* v. *Tibbits*, 5 Q. B. D. 560, 563, 50 L. J. Q. B. 33, 42 L. T. N. S. 797, 29 W. R. 66.

(*l*) *Potter* v. *Rankin*, 6 H. L. C. 113.

(*m*) *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557. *M'Kenzie* v. *Whitworth*, 1 Ex. D. 36, 45 L. J. Ex. 233, 33 L. T. N. S. 655, 24 W. R. 287.

[a] See Wood on Insurance, Vol. 1, p. 96 to 107 inc.

sured keeping the damaged property and receiving the amount of the damage. The solution of these questions depends on whether the identity of the property has been lost by the happening of the peril (*n*).

3. If the assured has any ways and means open to him to repair his loss otherwise than at his own expense or at the cost of his insurer, he must either cede such ways and means to the insurer on being paid in full the amount of his loss, or he must exercise such ways and means for the benefit of the insurer (*o*). He may not take with both hands. Any surplus recovered by him in excess of his actual loss he holds in trust for an insurer who has paid him. And while, if the insurance does not fully compensate him, he is entitled to control any action brought against other persons primarily responsible for the loss (*p*), he cannot even in such a case exonerate such other persons from liability (*q*). An uninsured man can release a right of action arising out of his loss, but a man who is insured may not release such claim in such a way as to prejudice his insurers. Either such release will be ineffectual, and the insurer will be able to sue in the insured's name, the release notwithstanding (*r*), or the assured will be liable (as for a breech of trust) for granting such release contrary to his duty arising out of the contract of insurance (*s*).

Subrogation.—This right of the insurer, which is termed [6 *] subrogation, *does not, however, apply in cases where insured property is injured by acts for which the assured would have been in law responsible if the property had not been his own.

Thus, where two ships, owned by the same man, collide by the fault of one, the insurers of the ship not in fault have been held not to be entitled to make any claim on the owner for the act of the other ship, though the insurers of the cargo would have such claim against the shipowner (*t*).

The reason for this apparent variation from the rule already stated is twofold—

1. That insurers take the risk of the assured's negligence as part of the risk against which they insure (*u*).

2. That the assured in the case cited could have no action against himself for the injury done by his one ship to his other, and that there is in such a case no right to which the insurer could on payment succeed.

Position inter se of insurers of the same property.—Insurers of the same interest in the same property all rank together for purposes of meeting a loss.

(*n*) *Castellain* v. *Preston*, 11 Q. B. D. 380, 397, per Bowen, L. J.
(*o*) *Ibid.*
(*p*) *Commercial Union* v. *Lister*, 9 Ch. App. 483, 485, 43 L. J. Ch. 601.
(*q*) *Smidmore* v. *Australian Gas-light Co.*, 2 N. S. W. Law 219.
(*r*) *Ibid.*
(*s*) *Commercial Union* v. *Lister*, *supra*, per Jessel. M. R.
(*t*) *Simpson* v. *Thompson*, 3 App. Cas. 279, 284, 38 L. T. N. S. 1.
(*u*) *Walker* v. *Maitland*, 5 B. & Ald. 171.

Their position is analogous to that of co-sureties (*x*), and they are entitled to insist upon contribution *inter se* proportionably to the amount each has at stake. More than the whole loss, as has been seen, may not be paid, and their several contracts are taken together as parts of one contract of indemnity, each paying accordingly.

**Aleatory contract. Difference between contract of insurance* [* 7] *and wager.*—Insurance is at times an aleatory contract. So far as this means a contract involving risk or speculation, the term is well applied, since it is certainly a contract of mutual risk (*y*), wherein the premium is risked against the chance of loss. But if aleatory be taken to mean gaming or wagering, the term is misapplied to insurance, for, although risk is of the essence of the contract (*z*), the assured is moved to effect insurance by the risk of loss, and does not create the risk of loss by the contract itself, as is the case in a pure wager; for in a pure wager the interest of the contracting parties in the event wagered on is created by the the fact that they have contracted to pay each other certain sums in a certain event, but that neither sum is due until the event has been decided one way or other: whereas in insurance the motive for the contract springs from the existence of something which may be lost, and the danger of loss thereby to the person who seeks insurance. And such person pays, and not merely risks money, in order to obtain security against the possible loss. In fact, unless the property insured is for a time subjected to the risk insured against, the contract of insurance, even if made, never operates, and the premium, though paid, is repayable; which illustrates yet further the principle that the person seeking insurance must, for the contract to be effectual, have had some prospect of needing indemnity against losing the thing insured within the period of insurance. From this it may be seen, that effecting a contract of insurance does not oblige the insured to run the risk named in the contract; for the contract being, as already said, contingent on the actual attaching of the risk, is not enforceable by either party till the risk is run; and premium paid before risk begun is paid subject to such contingency (*a*).

When policy attaches.—While a policy does *not attach till [* 8] the risk begins, it can equally not attach after the risk is determined one way or other, except in those special insurances when both parties, being equally ignorant of the position of the thing insured, contract to insure it lost or not lost.

Insurance and suretyship compared.—The similarities between insurance and suretyship go far to prove further, if further proof were needed, that insurance is not a wagering contract. In both

(*x*) *Castellain* v. *Preston*, 11 Q. B. D. 380, at 387, 52, L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 587.
(*y*) *Scottish Equitable* v. *Buist*, 4 Court Sess. Cas. (4th series) 1076.
(*z*) *Tyrie* v. *Fletcher*, 2 Cowper, 668.
(*a*) *Ibid.* 666.

contracts there is no chance of loss and an undertaking to indemnify; but no one has ever yet termed suretyship a wagering contract. The aim under each contract is not to get favourable odds, but a sound security, and the contracts aim at shifting the danger of loss, and not at creating an opportunity of gain. And it may be observed that from the earliest times in this country, as may be seen by the treatise of Malyns (1622) and the Statute of Assurances (43 Eliz. c. 12), insurance has been regarded as a means of distributing the risk of loss and dividing adventures (*i. e.*, risky mercantile enterprises) among a number of persons.

And when, in 1861, the City of London attempted to establish a fire office, the aim of the Corporation was not to profit by wagering contracts, but to provide a security (the City lands) to meet losses by fire at such a charge as would indemnify them for their liabilities.

The contract is uberrimæ fidei.—From the fact that insurance is a contract to shift risk flows the second great principle of insurance law, viz., that the contract is *uberrimæ fidei*, one requiring the utmost good faith on both sides (*b*).

This rule applies to every form of insurances, fire, life, or marine (*c*), though not quite to its fullest *extent to guar- [* 9] antee insurance, which comes within the rules of suretyship.

Assured's duty to disclose facts touching risks.—Under this rule complete disclosure must be made to the insurer of every fact going to establish the character of the risk to be shifted by the contract which is within the knowledge of the insurer, and which is not matter of common knowledge or speculation or mere opinion (*d*). If the assured keeps back information which goes to establish the risk, or which would affect the willingness of the insurer to take it (except perhaps information as to his the assured's own personal character, as he cannot be expected to speak ill of himself) (*e*), he will take nothing by the contract, but, in the absence of fraud or some stipulation to the contrary, will be entitled to have his premium, if paid, returned to him.

An insurer aware of invalidity of contract when he enters into it is estopped.—And where the insurer grants a policy, knowing that he will never run any risk thereunder, whether because facts invalidate it or the risk is already determined in his own favour, he will be equally subject to the rule of good faith, and will either be estopped from impugning the contract or held to have waived any breach of warranty or misrepresentation therein, or be liable to repay the premium received.

The rule applies not only in the procuring or granting of the

(*b*) 1 Arnould 5 (5th ed.).

(*c*) *London Assurance* v. *Mansel*, 11 Ch. D 363, 367, 48 L. J. Ch. 331, 27 W. R. 444, and cases there cited But see *Wheelton* v. *Hardisty*, 8 E. & B. 232, 285, 27, L. J. Q. B. 241, 81 L. T. 303, 6 W. R 539.

(*d*) *Carter* v. *Boehm*, 3 Burr. 1910.

(*e*) *Sun Mutual Co.* v. *Ocean Insurance Co.*, 107 U. S. (17 Otto) 485.

contract, but also while it lasts and after the risk has happened.

Assured's duty to avert the happening of the risk.—If the assured accelerates the happening of the risk, or if, when it occurs, he refrains from doing what he ought to lesson the damage consequent thereon, he hazards his chances of recovering on the contract. The *true view on this subject is extremely well laid down in a [*10] recent Canadian case (*f*) as follows:—

Duties of assured in case of fire.—"An agreement to indemnify another from a named contingency carries with it the provision that the person to be protected shall neither wilfully cause a loss nor purposely increase or inflame it by wilfully refraining from such obvious, easy, and ordinary exertion as may be always reasonably expected from a person willing to act honestly towards him to whom he looks for indemnity (*g*). If the assured wilfully prevents the interference of others to save the goods which would otherwise be destroyed, or the working of the fire engines, &c., to extinguish the fire, preferring to see them destroyed, in reliance on his insurance, he thereby commits a fraud on the insurers, which releases them from their contract" (*h*).

"Where he wilfully refrains from and neglects to save the insured property, having no reasonable excuse therefor, and having ample means at his disposal so to do, I think a like rule should apply. If a man have an insurance on valuable jewellery kept in a small box of light weight and readily portable, if he see the house in which he and they are, on fire, and he willfully and intentionally leaves the box to be consumed when he could readily remove it, preferring to rely on his insurance, the mind naturally revolts from such conduct, as evidencing a dishonest mind and a fraudulent disregard of the rights of others" (*i*). The Court in this case was careful to say that any act of the assured preventing his goods, &c., being saved, to disentitle him from his remedy under the policy, must be done with the fraudulent intention and purpose of throwing the loss on the insurers (*k*).

**Assured will not bear whole expense of saving property.*—[*11] This rule, of course, has its other side, that, if a man is bound to do his best for the insurer in case of a fire, he is not bound to do so at his own cost, the risk insured against having accrued. This result is well stated in an American case, *Witherell* v. *Marine Insurance Company*, 49 Maine, 200, 206.

Saving property.—If duty requires the occupants of a house which is in danger of being destroyed by fire to carry their property out of the door, or even to throw it from the windows rather than permit it to become a prey to the flames, they ought not to

(*f*) *Devlin* v. *Queen Insurance Co.*, 46 U. C. (Q. B.) 611, 621.
(*g*) See also *Chandler* v. *Worcester Insurance Co.*, 57 Mass. (3 Cush.) 328.
(*h*) *Devlin* v. *Queen Insurance Co*, 46 U. C. (Q. B.) 611, 622, per Hagarty, C. J.
(*i*) *Ibid.* 46 U. C. (Q. B.) 611, 623.
(*k*) *Balestracci* v. *Firemen's Insurance Co.*, 34 Louisiana Annual 844

be the losers by fulfilling the obligation thus imposed upon them; nor can it make any matter whether the injury arises from the fracture of a mirror or other piece of furniture by the fall, or the abstraction by a thief of a bale of goods when it reaches the pavement. If the danger is imminent, even though the event shows that the goods would not have suffered at all if left alone, the insurers are still liable.

The rule is, however, to a certain extent limited by the rules of general average contribution, and the insurers will not in every case be bound to meet the whole of such cost. Thus—

Cost of attempt to protect neighbouring house—In an American case (*l*), blankets were put on a building by the assured to protect it from combustion through a neighbouring fire. The insurers approved of the act, and the building was thereby saved. The blankets, however, were spoilt, and an action was brought by the assured against the insurer for the cost of them. It was held that the loss was not covered by the policy, but that it was a subject of general average, to which the insurer and the insured should contribute in proportion to the amount which they respectively had at risk in the store and its contents. It was also held that [*12] buildings in the neighbourhood, *which would have been endangered if the store had taken fire, and upon some of which the defendants had made insurance, were too remotely affected to be liable to contribution.

Whether fire policy on ship liable for average.—There is no question, of course, as to the application of the principle in marine insurance. American and English (*m*) Courts have, however, differed as to whether a fire policy on a ship was a marine policy so as to be liable for average. But in England it is very common to insert an average condition in a mercantile fire policy which avoids all question as to the law which might otherwise be doubtful, average not being in its inception a part of insurance law (*n*).

Fire policy—land or sea. Contribution from neighbours.—In any case it would seem possible to take a valid distinction between policies against risk of fire to part of a common adventure and risk of fire to property on land whose owners have no interest in common. It was on this principle that, in *Welles* v. *Boston Insurance Company*, 23 Mass. 182, the Court declared that a man who saved his house from fire at cost to himself, and thereby prevented the spread of a fire to other parts of the city, could not seek contribution from adjoining owners, saying that it "would not do to take so wide a range in the application of the principle of contri-

(*l*) *Welles* v. *Boston Co.*, 23 Mass. (6 Pickering) 182. But see *Thompson* v. *Montreal Co.*, 6 U. C. Q. B. 319.

(*m*) *Imperial Marine Co.* v. *Fire Insurance Corporation*, 4 C. P. D. 166. 48 L. J. C. P. 424. 40 L. T. N. S. 166 27 W. R. 680; *contra*, *Merchants'*, *&c.*, *Co* v. *Associated Fireman's Co.*, 36 Am. Rep. 428.

(*n*) *Atchison* v *Lohre*, 4 App. Cas. 755, 760, 49 L. J. Q. B. 123, 41 L. T. N. S. 328 28 W. R. 1.

bution. All the buildings in the city may remotely have been protected, and it would be impossible to draw the line."

Fraudulent intent may be inferred from gross negligence (*o*), or from forbearance to use reasonable exertions and means at hand to put out a fire (*p*).

**Is the contract of life insurance a contract of indemnity*—Life [*13] insurance has been already mentioned as perhaps an exception to the general principle that insurance implies indemnity. It would seem to follow from the words of the Gambling Act (14 Geo. III. c. 48), that no insurance may lawfully be made which is not in the nature of an indemnity for the loss of an interest. No man may insure against the loss of anything or the death of any person in which or in whom he has not an interest (*q*), nor for more than the value of that interest (*r*), nor recover on such insurance more than the interest which he has (*s*). Although the words of the statute seem intended to restrict insurance to indemnity, it has been decided that life insurance is not a contract of indemnity.

Insurance on life falls into two divisions—insurance on own life, and insurance on other's life. The two classes would seem, in theory at least, to be governed by different principles. To take, first, insurance on another's life: *Creditors' policies.*—A creditor insures his debtor's life as a means of securing himself against the chance of the debtor's dying without paying him, *i. e.*, as a collateral security for the debt (*t*), like a mortgagee's fire policy. In other words, he obtains a contract of indemnity against the loss of his debt by the death of the debtor before it has been paid. In such a case the debt is not a mere excuse for the policy; but the securing of the debt or indemnification against its possible loss is the reason for the insurance being effected.

Insurable interest in life.—Before the Gambling Act, Lord Hardwicke (*u*) held the law to be that only an interest at the time of insurance and of the happening of the event insured against would suffice, *i. e.*, that the assured must have had something to lose when the risk was insured against and have lost something by its occurrence. And to an *ordinary reader of the [*14] Act this principle would seem to be there affirmed.

Life policies do not usually state the reasons for which they were effected, nor the exact nature of the interest on which they are based. Nor do insurers usually raise the question of interest, unless they have some other grounds for disputing liability, and, in the absence of any suspicion of fraud, they are glad to insure a good life. But the practice of insurers is no more a criterion as to the policy or requirements of the law, than is the practice of pay-

(*o*) *Goodman* v. *Harvey*, 4 A. & E. 870, 876.
(*p*) *Gove* v. *Farmers' Co.*, 48 New Hampshire 43. *Huckins* v. *People's Insurance Co.*, 31 N. H. 238, 248.
(*q*) S. 1. (*r*) S. 1. (*s*) S. 3.
(*t*) *Stackpole* v. *Simonds*, 2 Park Ins. 932 (8th ed.).
(*u*) *Saddlers Co.* v. *Badcock*, 2 Atk 554, 1 Wilson 10.

ing debts of honour a proof that such debts could be sued on. Similar reasons guide in both cases. The law cannot stop people from paying what they are under no liability to pay, but a court of law would be entitled to demand proof of interest in an insurance policy, notwithstanding waiver by the insurers of such proof.

Is life insurance indemnity?—If *contemporanea expositio* were applied to the Gambling Act, there is little or no doubt that the views of Lords Mansfield and Ellenborough, two of our greatest mercantile lawyers, who understood fully the state of law, custom, and circumstances to meet which it was framed, would prevail on this subject. They both undoubtedly considered that insurance *sur autre vie* was a contract of indemnity; and in accordance with this view it was decided, in *Godsal* v. *Boldero*, 9 east 72, that a creditor of Mr. Pitt, who had been paid by his executors, could not recover on his insurance on Mr. Pitt's life.

This view was long held correct, but was overruled in two cases which now control the law as to life insurance—*Dolby* v. *The India and London Life Company* (*x*) and *Law* v. *London Indisputable Company* (*y*).

[*15] **Dalby* v. *India and London Life Co. discussed.*—The first of these decisions is based (1) on a misinterpretation of the Gambling Act, by the 3d section of which (*z*) it is provided that no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the assured in the life or event. In fire insurance, which is under the same statute, a man must have interest at the time of insurance and of loss. But in life insurance the words are construed in a different sense altogether. But it would seem to be clear that the same words in the same statute are not capable of two contrary constructions.

(2) On a confusion between a man's interest in his own and another's life. Admitting that a man cannot be indemnified for the loss of his own life, a creditor certainly can be so for the death of his debtor insolvent, and that is what he insures for. Unless he was owed the debt he could not insure the debtor, and usually insurance of the debtor is the last method a man would adopt for recovering his debt.

(3) On a mistaken view as to the nature of a premium. It is what a man will pay to protect himself from a probably greater loss. A man has no insurable interest in his premiums, and by law cannot insure them. He has no more interest in them than in his last year's butcher's bill. He has had in each case the equivalent, for by payment of the premium he has bought immunity from the risk he wishes to cover for the period for which he seeks insurance.

(4) On a *petitio principii*. Both cases consider that life insur-

(*x*) 24 L. J. C. P. 2, 15 C. B. 365, 18 Jur 1024, 24 L. T. 182, 3 W R. 116.
(*y*) 24 L. J. Ch. 196, 1 K. & J. 223, 1 Jur N. S. 179, 3 W. R. 155, 24 L T. 208.
(*z*) *Post*, p. 37.

ance cannot be a contract of indemnity, because the sum is certain, and all will be payable; but the very point to be decided is, Should the whole insurance money be payable at all events, or only so much thereof as compensates for the loss.

Creditors' policies.—In fire insurance the amount stated in [*16] the policy limits the liability of the insurer, but does not bind him to pay the whole sum on the happening of a fire, without any rights over the property insured; but if the view taken in the two cases under consideration be right, a man who is owed a debt may make thereof an excuse for a speculation in the life of his debtor (*a*), for if the ordinary rules of insurance do not apply there seems no reason why he should not "make an excuse of the statute" and take out a dozen policies each for the amount of his debt, and claim that, all being several contracts, no evidence can be adduced to show in any one case that he has over-insured his interest, since contribution is out of place unless the contract be one of indemnity. But the courts have shrunk from this consequence of these two decisions (*b*). The Liverpool poisoning case is a striking commentary on the possible abuse of the system of issuing creditors' policies. A woman having lent small sums of money, then insured the lives of her debtors for an amount exceeding the loans, and afterwards poisoned them to obtain the insurance-money (*c*).

Where such policies are kept up at the debtor's expense, they are a security given by him, and as such not open to objection; but where the creditor at his own expense insures the debtor, it is more economical for the creditor that the debtor should die quickly, since it enables him to get his debt paid at less cost. It is, indeed, clear that insurance by a creditor is open to very serious objections as it now stands, for, instead of having something to lose by the death of his debtor, he may actually find himself in pocket thereby. Unlike a mortgagee, he has no security for his debt, and indeed insures to make up *for the want of [*17] such security, not to find a means of preserving the security which he has; and insurance enables him either to get both his debt and his insurance money, or to let off his debtor at the expense of his insurers.

Provision of Canadian Civil Code as to creditors' policies.—In the Canadian Civil Code of Lower Canada, which as to insurance almost wholly corresponds with English law, and is a good summary thereof, the objections to creditors' and similar policies are met by article 2592, which is as follows: "The measure of the interest insured in a life policy is the sum fixed in the policy, except in the cases of insurance by creditors, or in other like cases, in which the

(*a*) See *Warnock* v. *Davis*, 104 U. S. (14 Otto) 775, and cases there cited.
(*b*) *Hebden* v. *West*, 3 B. & S. 579, 32 L. J. Q. B. 85, 7 L. T. N. S. 454, 11 W. R 423, 9 Jur. N. S. 747.
(*c*) *Reg.* v. *Flannagan*, 15 Cox Cr. Ca. 411.

interest is susceptible of exact pecuniary measurement. In these cases the sum fixed is reduced to the actual interest."

Own life policies and indemnity.—As to policies on a man's own life, different considerations arise, for no man can be indemnified for the loss of his own life. Such policies are usually effected as a provision for relatives or creditors.

Although an insurance by a man on his own life was at first (*d*) held to be a contract of indemnity, it has since been settled not to be so (*e*), but to be a contract by the insurer to pay a certain sum on the happening of a given event—usually the death of the assured, or his attaining a certain age—and the sum will not vary with reference to the greatness or smallness of the loss to the family of the assured.

Life policy.—By a policy of life assurance, the assurer agrees to pay the assured a certain sum of money on the death of a person therein named, and in consideration thereof the assured pays the assurer a certain smaller sum immediately on effecting the
[*18] insurance, or agrees to pay *the assurer a premium or annual sum until such death occurs; or if the whole period of life be not insured, then until the expiration of the term during which the insurance is to continue.

In the case of *Dalby* v. *India and London Life Assurance Co.* (*e*), a life assurance is thus defined:—"The contract commonly called life assurance is, when properly considered, a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of his life, and when once fixed it is constant and invariable. The stipulated amount of the annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except where bonuses have been given by prosperous offices) the same on the other." *Definition of life insurance per Jessel, M. R.*—The definition given by Sir Geo. Jessel of the contract of life assurance is "a purchase of a revisionary sum in consideration of a present payment of money, or, as is generally the case, on the payment of an annuity during the life of the person insuring" (*f*).

Life insurance converse of an annuity.—A policy of life insurance is not an insurance from year to year, but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life. A life policy is the converse of an annuity. A man elects to pay the insurers an annuity on their guaranteeing his representatives a lump sum on his death. In the other case a lump sum is paid by him, he to receive an annuity for his life.

(*d*) *Godsal* v. *Boldero*, 9 East 72

(*e*) *Dalby* v. *India and London Life Co.*, *supra*, p 18. *Fryer* v. *Moreland*, 3 Ch. D. 675, 685, 45 L J. Ch. 817, 35 L. T. N. S. 458, 25 W. R. 21.

(*e*) 15 C. B. 387, 24 L. J. C. P. 2, 24 L. T. 182, 3 W. R. 116, 18 Jur. 1024.

(*f*) *Fryer* v. *Moreland*, 3 Ch D. 685. See last page.

In either case there is no relation between the annual premium and the risk of assurance for the year in which it is paid.

*Indeed, the premium for single-year insurance is lower [*19] than the year's premium on a whole life policy, there being no certainty of death within the period and no option to continue (*g*).

Insurance against accident and indemnity.—An agreement to compensate a man for injuries by accident might seem to be a contract of indemnity, but it must be remembered that in this case, as in that of an insurance on a man's own life, the value of the peril insured against cannot be appraised in money, and therefore the insured cannot really be indemnified; for although the evil results of bodily injury can often be alleviated by what money will procure, mere money cannot allay or remove the suffering, and therefore cannot really constitute an indemnity. Moreover, the payment contracted by the insurers to be made in case of accident is, under present practice, a certain fixed, invariable sum. No gradual scale of compensation for different accidents could be satisfactorily framed, for the reason already mentioned, that bodily pain and suffering do not admit of a precise valuation. Where there is indemnity by the insurer, there is subrogation of him to the rights of the assured; but by the Railway Passengers' Assurance Company's second Act, the right of subrogation in case of accident insurance is negatived (*h*).

Insurance not pleadable in action for negligence.—A tortfeasor, who may have caused an accident, not resulting in death, cannot plead an insurance against accident in mitigation of damages (*i*), the result of which is that a man may sometimes make a considerable profit out of an accident by judicious insurance, since he is not accountable to his insurers for any surplus over and above full compensation.

Except where death ensues.—But where an insured man is killed by an accident, *the tortfeasors get the benefit of the [*20] insurance; for in an action under Lord Campbell's Acts the damages payable in respect of a death caused by a tortious act are reduced by reference to the prudence of the deceased in insuring his life, and the tortfeasor is allowed to plead such insurance in mitigation of damages (*k*). But if the man had lost all his limbs and senses, and retained his life, the tortfeasor could not have pleaded an accident policy in such mitigation; since the injury to the man himself and the injury to his family or representatives is different in kind.

(*g*) *Rose* v. *Medical, &c.*, 11 C. S. C. (2nd series) 151. *Scottish Widows' Fund* v. *Buist*, 3 C. S. C. (4th series) 1078.

(*h*) 27 and 28 Vict. c. 155.

(*i*) *Bradburn* v. *G. W. R.*, L. R. 10 Ex. 1, 44 L. J. Ex. 9, 31 L. T. N. S. 464, 23 W. R. 48.

(*k*) *Hicks* v. *Newport Railway*, 4 B. & S. 403 note.

THE CONTRACT OF INSURANCE.

The term policy.—The usual instrument containing a contract of insurance is called a policy, a term borrowed from the Italian merchants who introduced the practice of insurance into this country (*l*).

Contract to insure verbal at common law.—At common law a verbal promise for a valuable consideration to issue a policy of insurance is valid. "Such promise need not be in writing, any more than a promise to execute and deliver a bond or a bill of exchange or a negotiable note" (*m*); and insurance contracts other than guarantee insurances are not within the Statute of Frauds; and the contract, being consensual, depends for its validity on agreement between the parties as to the risk and premium, and not on the particular evidence used to prove the same (*n*).

[*21] **Whether policy necessary by statute.*—The Gambling Act (14 Geo. III. c. 48), s. 2, evidently contemplates that insurance will be made by policy, but does not enact that it shall be so made, but only that all policies shall contain the name of the person interested therein. No subsequent statute now in force enacts this, unless it be the Stamp Act (*o*), whereby it is enacted that the insurers are bound, under penalty, to issue a stamped policy within a certain time after they have accepted a premium. But this enactment obviously aims only at protecting the revenue, and it is impossible to suppose that it was thereby intended to punish the assured for a breach by the insurer of his statutory duty, or that it was intended to interfere with his right to demand a stamped policy, which would be evidence of the contract of insurance agreed between the parties.

Policy necessary by constitution of company.—Though, as has been seen, no enactment in express terms makes it necessary to have a contract of insurance in writing, the special constitution of each company usually provides the mode in which the company is to be bound, and policies must be issued in accordance with the provisions of such constitution before the assured can sue on the insurance. But this rule will not prevent the Courts from making a company issue a

(*l*) The Italian polizza is derived from πολύπτυχον, polyptychum, a tablet of several folds (as distinguished from diptych, triptych, &c.), used in late Latin for an account or memorandum book. See Facciolati, *s. v.* "polyptychum"—Littré, *s. v.* "police."

(*m*) *Kains* v. *Knightly*, Skinner 55 (A. D. 1681). *Commercial Mutual* v. *Union Mutual*, 19 Howard (U. S.) 318. *Newman* v. *Belsten*, 76 L. T. Journal, 228.

(*n*) *Bishop* v. *Clay Insurance Co.*. 49 Connecticut 167. *Bishop of Chatham* v. *Western, &c., Co.*, 1 Pugs. & Tr. (New Bruns.) 242.

(*o*) 33 & 34 Vict. c. 97, s. 26 (1).

policy when there is clear proof of an agreement to insure. In marine insurances, which by the Act 30 Vict. c. 23, must be by policy, it is especially common to issue after loss a stamped policy in accordance with the slip, which is held binding in honour, if not in law, as a real contract (*p*).

Parol evidence to show object of policy.—It may, it seems, be shown by parol evidence that a policy was intended by an intestate to be for the benefit *of his wife, under the Married Women's [*22] Property Act, 1870, s. 10; or the Married Women's Property Act, 1882, s. 11 (*q*). It must be observed that the insurers in this case did not dispute, though they had mistaken, the intestate's intention.

Action on policy not delivered.—If a policy has been duly signed and countersigned, and is ready to be, although it has not been in fact, delivered by the insurers, it will be deemed to be so far delivered that the assured cannot sue in equity for the loss, on the ground of the policy not being a perfected one, and therefore not sufficient to support an action at law (*r*). And where a policy purported to be signed, sealed, and delivered, and had in fact been signed and sealed, but had never left the office of the company, the House of Lords held that there was a delivery (*s*).

Insurance without policy.—It has been held in Scotland that there may be insurance without delivery of a policy if the terms are agreed and if the premium has been paid (*t*). *Policy must conform to contract.*—And if the policy when issued does not conform to the true intent of the parties at the time when the insurance is agreed upon, it may be rectified or the true contract sued upon (*u*). If a parol contract be proved, it will not be held to have merged in a policy which is not in conformity with the parol agreement (*x*), and in such case the policy may be rectified so as to accord with the parol contract (*y*). Indeed, on most policies issued there is a notice to *return them for correction if they are not ac- [*23] curately set out.

(*p*) See *Mead* v. *Davidson*, 3 A. & E. 303. *Lishman* v. *Northern Marine Co*, L. R. 10 C. P. 179, 44 L. J. C. P. 185, 32 L. T. N. S. 170, 23 W. R. 733. *Morocco Land Co.* v. *Fry*, 11 Jur. N. S. 70, 11 L. T. N. S. 618, 13 W. R. 310. *Fisher* v. *Liverpool Marine Co*, L. R. 8 Q. B. 469

(*q*) *Newman* v. *Belsten*, Sol. Jour. 23 Feb. 1884, p. 301.

(*r*) *M'Farlane* v. *Andes Insurance Co.*, 20 Grant (U. C.) 486.

(*s*) *Xenos* v. *Wickham*, L. R. 2 H. L. 296, 36 L. J. Ex. 313, 16 L. T. N. S. 800, 16 W. R. 38. *Jones* v. *Provincial*, 616 U. C. (Q. B.) 477. *Potter* v *Rankin*, 6 H. L. C. 114.

(*t*) *Christie* v. *North British*, 3 C. S. C. (1st series) 519, 1825. *Rossiter* v. *Tafalger Life*, 27 Beav. 377.

(*u*) *Albion Co* v. *Mills*, 3 Wils. & Shaw (Scotch) 218, 227, (H. L.). See *Wylie Times Fire*, 22 C. S. C. (2nd series) 1498.

(*x*) *Relief Fire Co.* v. *Shaw*, 94 U. S. (4 Otto) 574. *Newman* v. *Belsten*, *supra*.

(*y*) *Mottenx* v. *London Assurance*, 1 Atk. 545. *Collett* v. *Morrison*, 21 L. J Ch. 878, 9 Ha. 162.

And an offer to insure on terms cannot be revoked after receipt or acceptance.

Issue of policy after loss.—Insurers usually issue the policy even if the loss intervenes between the acceptance and the usual time for issue (*z*). But it would appear that if the risk is changed before the premium is paid they will not be liable (*a*).

The person to sue on the policy is the person in whom the interest appears.

Ambiguous covenant presumed to be with person interested.—Therefore where a policy was by deed poll and the covenant to pay was ambiguous as to the person *with* whom it was made, it was construed as being with the person in whom the interest appeared, and he was allowed to sue in his own name though he had not himself effected the policy (*b*).

Remedy for unperformed agreement to grant policy.—The proper mode of obtaining the benefit of an agreement to insure would seem to be either to sue for a proper policy, or claim damages for breach of contract to grant one, or to seek relief on the footing of a proper policy having been issued. The latter course has been adopted in Canada and the United States (*c*).

Company can't plead want of seal.—And in Canada the Supreme Court have held that an insurance company could be restrained from pleading want of a seal to a policy (*d*). This no doubt did substantial justice, and attained the end which might have been reached by a suit in equity for a proper policy; but the law laid down is at least doubtful, and the members of the Court were not unanimous.

[*24] **Accepting policy without noticing mistake.*—It is usual to print upon a policy a notice requiring the assured to inspect it immediately on receipt and return it for correction. But even if there be no such notice, if a man does not read his policy he has only himself to blame, and, by not returning it if wrong he may waive all right to complain subsequently of any mistakes contained in it (*d*).

A policy may of course be altered by consent of parties, whether the alteration consists in correcting an error or an omission, or in variation of the terms of the contract.

Alteration of policy.—But a material alteration of the policy by

(*z*) *Mildred* v. *Maspons*, 8 App. Cas. 874.

(*a*) *Canning* v. *Farquhar*, 16 Q. B D. 727, 58 L. J Q B. 225, 34 W. R 428.

(*b*) *Moss* v. *Legal and General Life*, 1 Victoria Law 315. *Sunderland Marine* v. *Kearney*, 16 Q. B. 925. *Hodson* v. *Observer Life Insurance*, 8 E. & B. 40, 26 L. J. Q. B. 303, 29 L. T O. S. 278, 3 Jur. N. S. 1125, 5 W. R. 712. *Evans* v. *Bignold*, L. R. 4 Q. B. 622, 38 L. J. Q. B. 293, 20 L. T. N. S. 659, 17 W. R. 882.

(*c*) *Penley* v. *Beacon Co.*, 7 Grant (U. C.) 130. *Mackie* v. *European Co*, 21 L. T. N. S. 102, 17 W. R. 987.

(*d*) *London Life Insurance Co.* v. *Wright*, 5 Canada (S. C.) 466.

(*d*) *Watkins* v. *Rymill*, 10 Q. B. D. 178, 52 L. J. Q. B. 121, 48 L. T. N. S. 426, 31 W. R. 337.

the assured without the consent of the insurer will be treated as a fraud, and avoid the contract (*e*).

Policy not according to agreement.—When on a proposal and agreement for an insurance policy is drawn up by the insurance office in a form differing from the terms of the agreement, and varies the right of the assured, the Court will look at the agreement and not at the policy (*f*). Where the mistake cannot be rectified, it seems that the contract will be rescinded and a return of premiums ordered (*g*).

When a mistake will not be rectified.—Where a policy is not in accordance with the real terms of the agreement, but such terms though agreed on with the agent by the person seeking insurance have not been by him, or at all, communicated to the insurer, or if communicated not adopted, rectification will not be ordered, but the policy will be declared not binding on the insurers, and they will have to *repay the premiums paid, as money [*25] paid to them under a mistake (*h*).

Subject to the power of proving that the policy does not embody the real terms agreed upon, no material terms may be imported into a written contract of insurance which the parties have not thought fit to insert (*i*).

Loss of policy. Company indemnified by judgment.—If a policy of assurance be lost or destroyed, an action will nevertheless lie to recover the insurance money, and the order or judgment of the Court directing the office to pay will be a sufficient indemnity against subsequent claims (*k*).

Premium—preliminary payment.—Payment of a premium demanded on application for a policy does not give the applicant an absolute title to a policy. But if the risk is rejected or a higher premium demanded and refused, the insurer must offer to return the premium. Still, the mere fact that the agent retains the premium by arrangement with the applicant, pending an effort to get the insurers to reconsider their decision, will not amount to a failure to repay (*l*).

Interim notes.—The interim protection notes given by fire insur-

(*e*) *Liverpool, London and Globe* v. *Wyld*, 21 Grant (U. C.) 458, 23 Grant 442, 1 Canada 604. *Hill* v. *Patten*, 8 East 373. *French* v. *Patten*, 1 Camp 72, 180. *Farlie* v. *Christie*, 7 Taunt. 416. *Langhorn* v. *Cologan*, 4 Taunt. 330 *Sanderson* v *Symonds*, 1 B. & B. 426. *Master* v. *Miller*, 4 T. R 320.

(*f*) *Collett* v. *Morrison*, 9 Hare 162, 21 L. J Ch. 878 *Henkel* v. *Royal Exchange*, 1 Ves. Sr. 317. *Parsons* v. *Bignold*, 15 L. J Ch. 379, 13 Sim. 518, 7 Jur. 591. *Bull* v. *Storie*, 1 S. & S. 210. But see *M'Kenzie* v. *Coulson*, 8 Eq. 368

(*g*) *Fowler* v. *Scottish Equitable*, 28 L. J. Ch. 225, 32 L. T. 119, 4 Jur. N. S. 1169, 7 W. R. 5

(*h*) *Fowler* v. *Scottish Equitable*, *supra*.

(*i*) *Dudgeon* v. *Pembroke*, 2 App. Cas. 284, 298, 46 L. J. Q. B 409, 36 L T. N. S. 382, 25 W. R. 499. *Gibson* v. *Small*, 4 H. L C. 353.

(*k*) *Crockatt* v *Ford*, 25 L. J. Ch 552, 2 Jur. N. S 436, 4 W. R. 426. *England* v. *Tredegar*, L. R 1 Eq. 344, 35 L. J. Ch. 386, 35 Beav. 256.

(*l*) *Otterbein* v. *Iowa State Insurance Co.*, 57 Iowa 274.

ance companies bear an analogy to the slips commonly used in cases of marine insurances preliminary to the issuing of policies (*m*). The slip contains the heads of the contract, and is itself a contract of insurance, but not a policy, and, in virtue of certain enactments, not enforcable at law or in equity, but available in evidence where material.

[*26] **Interim notes.*—The interim note contains a proposal to effect an insurance on the companies' usual terms and conditions, and the interim insurance is made subject to those terms and conditions, and they ought to be read into the interim note so far as they are lawful; and the note forms a contract of insurance during the interval between the proposal and the final acceptance or refusal of the insurers (*n*).

Interim receipts.—Interim receipts for the whole or part of the premium, and insuring the applicant for a month or until notice of rejection, are common in England, but have rarely been subjects of action (*o*).

An insurance company are clearly entitled to make the insurance under an interim receipt subject to the conditions in the usual policy (*p*). Reference thereto in the receipt will affect the applicant with notice thereof (*q*), provided that he is permitted an opportunity of learning what the conditions are.

If the interim receipt be for so many days, and the policy contain a condition that the insurance may be terminated at any time within the period originally contracted for on ten days' notice, and the repayment of a rateable proportion of the premium for the unexpired term, ten days' notice must be given to terminate the interim insurance and tender of the unearned part of the premium made (*r*). So if a fire happens within a period of interim insurance, but after notice that a regular insurance will not be issued, the insurance company are bound for ten days after the notice given (*s*).

[*27] *But if the insurers give no notice of rejection, and do not issue a policy, it would seem that they will be taken to have elected to accept the proposal, and they will be liable thereon, unless, of course, it is stated that silence amounts to refusal to go on with the contract. Where an interim receipt was given on a form declaring that a policy would be issued in sixty days if approved, and the agent giving the receipt did not report the transaction, the

(*m*) *Queen Insurance Co.* v. *Parsons*, 7 App Cas. 96, 125, 51. L. J P. C. 11 45 L. T. N. S. 721. *Ionides* v. *Pacific*, L. R. 7 Q. B. 517, 41 L. J Q B 190. 26 L. T. N. S. 738, 21 W. R. 22.

(*n*) *Queen Insurance Co.* v *Parsons*, 7 App. Cas. 96, 125, 51 L. J. P. C. 11, 45 L. T. N. S. 721.

(*o*) *Mackie* v. *European Co.* 21 L T. N. S. 102, 17 W. R. 987.

(*p*) *M'Queen* v *Phœnix*, 29 U. C. (C. P.) 511.

(*q*) *Queen Insurance Co* v. *Parsons*, 7 App. Cas. 96, 124 *sqq.*; *vide supra*

(*r*) *Grant* v. *Reliance Mutual Fire Co.*, 44 U. C. (Q B.) 229.

(*s*) *Ibid.*

insurers are held liable for his neglect and the absence of the policy —the receipt constituting a valid insurance (*t*).

Transaction amounting to re-insurance. Policy dated after fire. Re-insurance. "Burnt or not burnt."—It is rare for a case to arise of a policy against fire on land, lost or not lost. But in *Giffard* v. *Queen Insurance Company* (*u*), the plaintiff insured in the London and Liverpool Company from 2nd October 1865 to 2nd October 1866. Before the term expired he received a notice from their sub agent that the insurers would renew, and accordingly he paid the premium to him on their account. The general agent of the company declined to renew the policy, and paid the premium to the Queen Insurance Company (the defendants), who issued a policy, dated 16th Oct. 1866, but insuring from 2nd Oct. 1866 to 2nd Oct. 1867. The premises were destroyed by fire on 13th October, before the policy was issued; but the plaintiff did not know that he was insured by the defendants until he received the policy from the sub-agent, who also acted for the defendants. It was held that the transaction amounted to a re-insurance, and that the defendants in effect insured the property, "lost or not lost," in other words, "burnt or not burnt," from 2nd Oct. 1866 to 2nd Oct. 1867.

Open policy.—In certain businesses in this country it seems to be the practice to take out an open policy against all risks by sea and land, and to provide that the assured may declare thereon so soon as he learns that property at *his risk of the class [*28] insured is in transit to him, and whether such property is at the time lost or not.

Firms which have to transmit valuable property or securities through the post thus insure them; and even when simultaneously advised of transmission and loss, they can still, under such a policy, declare their loss, provided only that they observe good faith in the transaction.

Floating policy.—Another class of policy is that termed a floating policy. The amount of goods covered by such a policy is ascertainable at the moment of loss only, and to protect the insurers, such a policy provides that the liability of the insurers shall be only rateable.

Thus if it be on a fluctuating amount of goods in a warehouse, and the amount there at the date of a fire exceed the amount of insurance, the owner will be his own insurer *pro rata*, and will not receive the whole of the insurance money. This kind of policy is adopted to prevent the assured from making his policy cover in effect a larger amount of goods than are fairly insurable at the premium paid (*x*).

(*t*) *Patterson* v. *Royal Insurance Co.*, 14 Grant (U. C.) 169.
(*u*) 1 Hannay (New Bruns.) 432.
(*x*) Vide post, cap. xi.

CONSTRUCTION OF POLICY.

Policy as a rule construed like other instruments.—"The same rule of construction which applies to all other instruments, applies equally to a policy of insurance, viz., that it is to be construed according to its sense and meaning as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently [*29] points out that they must in the particular instance, *and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.

Difference between policies and other instruments.—"The only difference between policies as assurance and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definate meaning, and that the words superadded in writing (subject, indeed, always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects" (*y*).

Strictum jus not rule of construction.—Lord Mansfield's view of the construction of policies was that "It is certain that in the construction of policies the *strictum jus* or *apex juris* is not to be laid hold of; but they are to be construed largely for the benefit of trade and for the insured" (*z*).

Construction of policies.—In the mercantile contract of insurance it is always the custom to express the mutual bargain in short and conventional terms. The assured is not meant to be bound to carry out his adventure in exact conformity with the words rigidly construed and confined to what is absolutely necessary, but the general words of the policy are intended to be construed so as to conform to the usual and ordinary method of pursuing the adventure (*a*).[s]

(*y*) *Robertson* v. *French*, 4 East 130, 135, per Lord Ellenborough.
(*z*) *Pelly* v. *Royal Exchange*, 1 Burr. 341, 348.
(*a*) *Pearson* v. *Commercial Union*, 1 App. Cas. 507, per Lord Penzance.
[s] Policy on a hotel, its furniture, &c., excepted, "goods held on storage." **Held, that** furniture stored to be used in the business of the hotel was not within the exception. *Continental Ins. Co.* v. *Pruitt*, 65 Texas 125.

*_Liberality of construction not indifference._—But liberality of [*30] construction can never justify indifference to the real purpose of a policy, or warrant the recognition of an obligation which was not directly or by reasonable implication imposed by its terms, when those terms are fairly interpreted according to their natural and ordinary meaning (_b_).

Policy construed against company.—The terms of a policy of life assurance, being the language of the company, must be taken most strongly against them (_c_). This view is in accord with *Anderson* v. *Fitzgerald*, 4 H. L. C. 484, where Lord St. Leonards says—"It [the policy] is of course prepared by the company, and if, therefore, there should be any ambiguity in it, it must, according to law, be taken more strongly against the person who prepared it."

True meaning of a contract.—And in another recent Scotch case the same view is thus expressed—that is the true meaning of my contract which I desire the other contracting party to put upon it, not that which in my own favour I wrap up in general phrase (_d_).

In *Birell* v. *Dryer* (_e_), however, it was held that whether the underwriters are to be considered the "proferentes" (within the meaning of the maxim "Verba fortius accipiuntur contra proferentem") with regard to a condition in a policy of insurance depends upon the character and substance of the condition.

This is the same rule of construction as is applied to guarantees (_f_), and generally to all instruments prepared by one party and tendered to the other (_g_).

*_Courts look more to the policy than custom._—The tendency of [*31] judicial decisions is to pay more regard to the policy and less to evidence of custom. The reason of this is that policies, especially fire and life, are drawn with more care and skill than formerly, and have been corrected in accordance with decisions, and made more distinct and precise with the growth of actuarial experience (_h_). Fire and life policies are drawn as legal and not mercantile documents, and there are not many cases in which they can be construed with reference to mercantile custom except in floating policies by wharfingers and others. In America the tendency is the same (_i_).

Custom may control ambiguous meaning.—When the interpretation

(_b_) *Ibid.*, 1 App. Cas. 510, 45 L. J. 761, 35 L. T. N. S. 445, 24 W. R. 951.
(_c_) *Notman* v. *Anchor Co.*, 4 C. B. N. S 476, 27 L. J. C. P 275, 31 L. T. O. S. 202, 6 W. R. 688, 4 Jur. N. S. 712. *Fitton* v. *Accidental Death*, 17 C. B. N. S. 122, 34 L. J. C. P. 28. *Smith* v. *Accidental &c., Co.*, 22 L. T. N. S. 861, 39 L. J. Ex. 211, L. R. 5 Ex. 303
(_d_) *Life Assocn. Scotland* v. *Foster*, 11 C. S. C. (3rd series) 351, 371.
(_e_) 9 App. Cas. 345, 51 L. T. 130, 21 Sc. L. R. 590.
(_f_) *Hargrave* v. *Smee*, 6 Bing. 244, per Tindal, C. J.
(_g_) *Meyer* v. *Isaac*, 6 M. & W. 605, 612, per Alderson, B.
(_h_) See *Pearson* v. *Commercial Union*, 1 App Cas. 510, per Lord O'Hagan.
(_i_) *North British and Mercantile* v. *Liverpool, London and Globe*, 46 L. J. Ch. 537 5 Ch. D. 569, 36 L. T. N. S. 629. *North British and Mercantile* v. *Moffat*, L. R. 7 C. P. 25, 41 L. J. C. P. 1, 25 L. T N. S 662, 20 W. R. 114.

of words or the construction of a clause in the policy, that may be understood in a sense more or less extensive, has not been fixed by judicial decisions, parol evidence may be admitted to show whether they have obtained by use and practice between the assurers and the assured any, and what, known and definite import (*k*). The usage if proved will govern the construction (*l*).

Words construed in popular sense.—When any doubt arises as to the meaning of a word the Courts will usually construe it in its popular and not in its philosophical sense, on the principal that the parties expressed themselves in the ordinary language of men of business and owners of property, who have insured or who are about to insure (*m*).

For instance, fire will not be held to include explosion, even where the explosion is due to ignition, nor gas held to include all that chemists would include under the word.

[*32] **Custom cannot contradict language of policy.*—Primary stress must be laid on the language of the policy. If that be clear, no custom can be admitted to contradict it, and no custom which is not a general custom of trade will be admitted (*n*).

This applies to all contracts of insurance, as to other mercantile contracts. Even if the latter are in short terms, unless there is dubiety or ambiguity in the contract, evidence of custom will not be received (*o*).

Explanation of policy by custom.—Parol evidence may be adduced to explain, but not to contradict, a written document, and in a commercial contract, mercantile custom will be the dictionary whence to draw explanations (*p*). But Lord Hatherly, in the same case, said in effect that only the very strongest evidence of custom could impose a non-natural meaning on a contract whose terms have a plain natural sense and meaning. *Policy on hardware does not include gunpowder.*—Thus a policy on a general stock of hardware will not cover gunpowder, and if there be a condition against storage of gunpowder, parol evidence will not be admissible that the parties understood hardware to include gunpowder in canisters (*q*).

What covered by word linen.—If a person who is not a linendraper insures against a fire his "stock-in-trade, household furniture, *linen*, wearing apparel and plate," the policy will not include and protect linendrapery goods subsequently purchased on speculation; the

(*k*) *Syers* v. *Bridge*, 2 Doug. 527.

(*l*) *Crofts* v. *Marshall*, 7 C. & P. 597.

(*m*) *Stanley* v. *Western Insurance*, per Kelly, C. B., 37 L. J. Ex. 73, L. R. 3 Ex. 71, 17 L. T. N. S 513, 16 W. R. 369.

(*n*) *Robertson* v. *Marjoribanks*, 2 Stark 576. *Blackett* v. *Royal Exchange*, 2 C. &. J. 244, per Lyndhurst, C. B. (249).

(*o*) *Bowes* v. *Shand*, 2 App. Cas. at 486, per Lord Gordon; 46 L. J. Q. B. 561, 36 L. T. N. S. 857.

(*p*) *Bowes* v. *Shand*, 2 App. Cas. 468, per Lord Cairns, 25 W. R. 730.

(*q*) *Mason* v. *Hartford Fire*, 37 U. C. (Q. B.) 437. See *Blackett* v. *Royal Exchange*, 2 C. &. J. 244.

word *linen* in the policy will be confined to household linen, or linen used as apparel (*r*).

Baker's stock.—The stock-in-trade of a baker does not mean his bread only (*s*).

**Fraud in obtaining policy. Acquiescence. Acceptance of* [*33] *premium after discovering fraud.*—A policy obtained by fraud, or by a breach of the high degreee of good faith required as between insurer and assured, being only voidable, the party defrauded, whether insurer or assured, must take steps to avoid the contract (*t*), or he will be held, by his quiescence, to have assented to the contract and elected to treat it as valid. If the insurer discovers that he has been induced by fraud to grant the policy, and after such discovery accepts premiums and treats the policy as good, it would seem that he would thereafter be estopped from denying its validity, more especially if he allows the policy to be assigned to a *bona fide* holder for value (*u*).

Courses open to insurer from whom policy obtained by fraud.—There are three courses open to the insurer on discovering that *he has been induced* to grant the policy through fraud of the assured—

1. To refuse to receive further premiums, and repudiate the contract after discovering the fraud.

2. To seek cancellation of the policy, offering at the same time to return all premiums paid (*x*).

3. If the policy has matured, by defending any action for recovery of the insurance money (*y*).

Fraud of insurer where by terms of policy no action maintainable.—Fraud in inducing a person to accept a policy will not render the insurers liable thereon, if by the terms of the policy the action is not maintainable (*z*). To hold otherwise would be to permit recovery on a contract other than that made (*a*). The only remedy *is to repudiate the contract and seek rescission and [*34] return of premium.

(*r*) *Watchorn* v. *Langford*, 3 Camp. 423.

(*s*) *Moadinger* v. *Mechanics' Fire, &c*, 2 Hall (N. Y.) 490, 2 N. Y. (Sup. Ct.) 527.

(*t*) *British Equitable* v. *G. W. R.*, 38 L. J. Ch. 132, 314, 20 L. T. N. S. 422, 17 W. R. 561. *London Assurance* v. *Mansel*, 11 Ch. D. 363, 48 L. J. Ch. 331, 27 W. R. 444.

(*u*) See per Inglis, L. P., in *Scottish Equitable* v. *Buist*, 4 C. S. C. (4th series) 1076 to 1082.

(*x*) *Prince of Wales Assurance Co.* v. *Palmer*, 25 Beav. 605. *London Assurance* v. *Mansel*, 11 Ch. D. 363, 372, *supra*. *British Equitable* v. *G. W. R.*, *vide supra*, note (*t*).

(*y*) *London and Provincial Marine* v. *Seymour*, 17 Eq. 85, 43 L. J. Ch. 120, 29, L. T. N. S. 641, 22, W. R. 201. *Seymour* v *London and Provincial*, 42 L. J. C. P. 111 note, 27 L. T. N. S 417.

(*z*) *Tebbetts* v. *Hamilton Mutual Fire*, 85 Mass. (3 Allen) 569.

(*a*) *Fowler* v *Scottish Equitable*, 28 L. J. Ch. 525, 32 L. T. 110, 7 W. R. 5, 4 Jur. N. S. 1169.

If the insured had a right to rescind, and acted on the contract, he cannot subsequently rescind (*b*).

Insurers not stopped from pleading want of insurable interest by reason of failure in former action to cancel policy for fraud.—If the insurers have sought to cancel a policy on the grounds of fraud in the application, not going to the interest of the assured, and have failed, they will not be stopped by the former judgment from pleading to an action on the policy that the assured had no interest in the life on which the policy was granted (*c*).

Illegal insurance.—Insurance on an illegal undertaking is void. This is well understood in marine insurance (*d*). Few cases could be suggested of land insurance on buildings used for an illegal purpose in this country. But in Americr cases are common. Thus insurance on spirits, and casks containing them, in a State where an anti-liquor law was in force, has been held void (*e*), and also one on an unlicensed billiard and drinking saloon (*f*). But where the policy was on the stock of a chemist who had liquor unknown to the insurers for illegal sale, the Court held that there was nothing to show the insurers that the object of the contract was illegal (*g*).

Test whether illegality avoids policy.—The test question there is, whether the violation of law is the direct purpose of the contract or purely collateral to and independent of it (*h*). But it would seem more in accordance with the policy of the law to hold that no one should be allowed to receive indemnity in respect of property used for an unlawful purpose, if that use continues down to the date of the loss.

(*b*) *Lloyd* v. *Union Ins. Co.*, 2 Pugsley (New Bruns.) 498. See *Clarke* v. *Dickson*, E. B. & E. 148, 33 L. T. 136, 7 W. R. 443.

(*c*) *Ferguson* v. *Massachusetts M. & D. Co.*, 22 Hun. (N. Y.) 320.

(*d*) *Cunard* v. *Hyde*, 2 El. & El. 1.

(*e*) *Kelly* v. *Home Ins Co.*, 97 Mass 288

(*f*) *Johnson* v. *Union Mutual Fire Co.*, 127, Mass. 555.

(*g*) *Carrigan* v. *Lycoming Fire*, 38 Am. Rep. 687. *Niagara Fire* v. *Degraff*, 12 Mich. 124

(*h*) *Boardman* v. *Merrimack Ins. Co.*, 62 Mass. (8 Cush.) 583. *Hinckley* v. *Germania Fire Co.*, 140 Mass. 38, 54 Am. Rep. 445.

*CHAPTER II. [*35]

INSURABLE INTEREST.

Any one with interest can insure.—Any person may insure, provided that he has an insurable interest (hereinafter defined) in the life or property to be insured[1]. It is sometimes said that minors cannot enter into contracts of insurance. But there seems no reason why, if insurers are willing to enter into a contract of insurance with an infant, he should not be able to contract with them in the same manner as he might enter into other contracts which are for his benefit.

Infants.—The rule being that a contract by an infant which is avoidable only by him and not absolutely void is binding upon the other contracting party until avoided. The privilege of avoidance is that of the infant only, and not that of the other party with whom he contracts (*a*). But if an infant, after having paid the premium and had the benefit of the insurance for a time, were to repudiate the contract, it would seem that having had the consideration in part he could not upon repudiation recover the premium paid by him (*b*).

Husband and wife.—A married woman may insure, and is presumed to have an insurable interest in the life of her husband (*c*). But the husband is not presumed to have such an interest in the life of his wife (*d*), except, perhaps, in Scotland (*e*) and America (*f*).

*By the married Women's Property Acts, 1870, (*g*) and [*36] 1882 (*h*), a married woman may insure her own or her husband's life for her separate use; and by the same Act a policy effected by a married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the ben-

[1] Where loss is made payable to a third person, he has *prima facie* interest in the contract although he may not have an insurable interest in the property insured. *Parks* v. *Connecticut Fire Insurance Co.*, 26 Mo. App. 511.

(*a*) Leake Contracts, 552.

(*b*) *Holmes* v. *Blogg*, 8 Taunt. 508. Ex parte *Taylor*, 8 D. M. & G. 254, 26 L. J. Bkcy 35.

(*c*) *Reed* v. *Royal Exchange*, 2 Peake (Add. Cas.) 70.

(*d*) *Halford* v. *Kymer*, 10 B. & C. 725.

(*e*) *Wight* v *Brown*, 11 Court Sess. Ca. (2d series) 459, and see 16 and 17 Vict. c. 34, s. 54

(*f*) *Currier* v. *Continental &c., Co.*, 52 Am. Rep. 134.

(*g*) 33 & 34 Vict. c. 93, s. 10.

(*h*) 45 & 46 Vict. c. 75, s. 11.

efit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or his creditors, or form part of his estate; and a trustee thereof may be appointed by a judge of the Chancery Division of the High Court, or by the judge of the County Court within the jurisdiction of which the insurance office is situate. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid (*i*).

Gambling act.—The existence of an insurable interest as the basis of a contract of insurance is made necessary by the statute called the Gambling Act (*k*), which enacts, as follows:—

SEC. 2. Whereas it has been found by experience, that the making insurance on lives, and other events wherein the assured shall have no interest, hath introduced a mischievous kind of gambling, be it enacted that from and after the passing of this Act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on [*37] any other event or events whatsoever, wherein *the person or person for whose use, benefits, or on whose account such policies shall be made, shall have no interest, or by way of gaming and wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever.

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Sec. 3. And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, event or events.

14 Geo. III. c. 48, in America.—This statute was never in force in America, but has been there interpreted as declaratory only of the common law (*l*); and this view is supported by English cases (*m*), at any rate so far as concerns fire insurance.

Ireland.—In Ireland the Gambling Act applies to policies executed after 1st Nov. 1866 (*n*).

What is an insurable interest, per Lord Eldon.—What will be an insurable interest within the statute is not easy to define. Lord Eldon

(*i*) *Holt* v *Everall*, L. R. 2 Ch. D. (C. A.) 266, 45 L. J. Ch. 433, 34 L. T. N. S. 599. 24 W. R. 471. Re *Mellor's Policy Trusts*, L. R. 7 Ch. D. 200, 47 L. J. Ch. 247, 26 W. R. 309.

(*k*) 14 Geo. III c. 48 (A. D. 1774)

(*l*) *Ruse* v. *Mutual Benefit Life Co.*, 23 N. Y. 516.

(*m*) *Lynch* v. *Dalzel*, 4 Bro. P. C. 431. *Sadlers Co.* v. *Badcock*, 2 Atkyns 554, 1 Wils. 10.

(*n*) 29 & 30 Vict. c. 42.

said (*o*), "Since the 18 Geo. II. (*p*) it is clear that the assured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right or a right derived under a contract and a mere expectation or hope which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain, however, endeavored to find a fit definition for that which is between a certainty and an expectation, *nor am I able [*38] to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property insured, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. Expectation, though founded upon the highest probability, is not interest, and it is equally not interest whatever might have been the chances in favor of the expectation." His lordship went on to say, "If moral certainty be a ground for insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First the dock company, then the dockmasters, then the warehouse-keeper, then the porter, then every other person who to a moral certainty would have anything to do with the property, and of course get something by it. Suppose A. to be possessed of a ship limited to B., in case A. dies without issue; that A. has twenty children, the eldest of whom is twenty years of age (!), it is a moral certainty that B. will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir-at-law of a man who has an estate worth £20,000 a year, and is ninety years of age: upon his deathbed inestate and incapable, from incurable lunacy, of making a will, there is no man who will deny that such heir-at-law has a moral certainty of succeeding to the estate, yet the law will not allow that he has any interest or anything more than a mere expectation."

"Considering," in the words of the same learned judge, "the caution with which the Legislature has provided against gambling by insurances upon fanciful property, it is certainly desirable that no *purely sentimental interest*, such as an expectation or an anxiety, should be made the ground of a policy."

Definition of interest, per Lord Blackburn.—Lord Blackburn said, "I know no better definition of an interest in an event than that by Lawrence, J., that if the event happens, the party will gain *an advantage; if it is frustrated, he will suffer a loss" (*q*). [*39]

Not necessary to state exact interest in policy.—It is not necessary in a policy of insurance to state the precise nature of the interest, and whether the property be absolute or special. A consignor, a consignee, a prize agent (as such), may all insure; but

(*o*) *Lucena* v. *Crawford*, 2 N. R. 269, 321, 1 Taunt. 325.

(*p*) 19 Geo. II. c. 37, relates to marine insurance.

(*q*) *Wilson* v. *Jones*, L. R. 2 Ex. 150, per Blackburn, J., 36 L. J. Ex. 78, 15 L. T N. S. 669, 15 W. R. 435.

they are not bound to specify what the interest is (*r*) in the absence of special stipulation.

Re-insurance.—Any one who by contract is liable to pay any money in case of the loss of anything has an insurable interest in that thing. This includes insurers. They have an interest in the subject-matter of a policy which will support a re-insurance, which is now in every case lawful by English law (*s*).

As a general principle the Courts will lean in favour of an insurable interest if possible without assuming facts which do not exist, or stretching the law beyond its proper limits (*t*).

Own life.—In his own life a person's insurable interest is considered to be sufficient to entitle him to recover whatever sum he may have it insured for, and this is so if the insurance is for a portion of his life only (*u*).

Nominally own life but really another.—But the law will not allow the provisions of the statute to be evaded by an insurance being nominally effected by a person on his own life, but really for another person who pays the premiums, and to whom the policy is assigned. *Payment of premiums not conclusive evidence whose policy is.*—The mere circumstance, however, that some other party paid the premiums would not *per se* be sufficient evidence that [*40] the insurance was not *for the benefit of the person in whose name it was effected (*v*).

Assignee of policy.—The *bonâ fine* assignee, whether for valuable consideration or not, of a person who has insured his own life has as full a right to the policy-money as his assignor would have had without such assignee having any interest in the life of the assignor beyond the assignment itself (*x*).

Parent in child's life.—A parent has not by virtue of his relationship only an insurable interest in the life of a child (*y*). And where a father effected an insurance for his own benefit, but in the name and on the life of his son, in which he had no insurable interest, on the death of the son it was held that as between the company and the father the policy was void, but as between the

(*r*) *Crowley* v. *Cohen*, 3 B. & Ad. 478, 1 L. J. K. B. 158 (1832).

(*s*) 19 Geo. II. c 37, s. 4, forbidding re-assurance, is repealed. The statute now in force on this subject is 30 & 31 Vict. c. 23. The American law is to be found in *New York Bowery Fire* v. *New York Fire*, 17 Wendell (N. Y.) 359.

(*t*) *Stock* v. *Inglis*, 12 Q. B. D. 564, 10 App. Cas. 263.

(*u*) *Wainwright* v. *Bland*, 1 Mood. & Rob. 481, 1 M. & W. 32, 5 L. J. Ex. 147.

(*v*) *Shilling* v. *Accidental*, 27 L. J. Ex. 17, 1 F. & F. 116, 2 H. & N. 43, 5 W R. 567. *Scott* v. *Rose*, Long & Towns. 54, 3 Ir. Eq Rep. 170. *Vezina* v. *New York Life*, 6 Canada (S. C.) 30. *Armstrong* v. *Mutual Life*, 20 Blatch. (U. S.) 493.

(*x*) *Ashley* v. *Ashley*, 3 Sim. 149. *Mutual Life Co.* v. *Allen*, 52 Am. Rep. 245

(*y*) *Halford* v. *Kymer* 10 B. & C. 724. See as to America, *Currier* v. *Continental Life Assurance Co.*, 52 Am. Rep. 134.

father and the son's estate the father was entitled to the money for his own benefit (*z*).

Son in father's life.—A son has an insurable interest in the life of a father who supports him, but not in the life of a father depending on him for support (*a*).

Sister and brother.—A sister has an insurable interest in the life of a brother who supports her (*b*).

General rule.—The general rule would seem to be, that where the person who insures the life of another is so related to that other as to have upon him a claim for support enforceable by law, there the relationship gives an insurable interest[2], and where a relative is as a fact supported, he has, according to American decision, an insurable interest in the life of him by whom he is *sup- [*41] ported (*c*), but mere natural love and affection is not sufficient *per se* to constitute insurable interest (*d*).

Moral certainty. Expected profits.—Moral certainty that a person will succeed to property does not suffice to give him an insurable interest in such property. Nor will mere expectation of profit be sufficient, for as Lord Eldon said, "I send my ship to India, I expect profit from the voyage; if the ship is lost, my expectation is defeated, but of those expected profits the law can have no consideration" (*e*).

Profits on sale of goods.—An insurance may, however, be effected on profits to arise from the sale of goods, provided the assured has an insurable interest in such goods (*f*).

Profits. Profits of business.—Profits may be insured on the principle of their forming an additional part of the value of the goods, but they must be insured *quâ* profits, and cannot be recovered merely as an incidental part of the loss. Therefore, under an insurance by A. of his interest in the "Ship Inn and offices," A. could not recover compensation for the loss of profits in his business as an innkeeper in the interval between the fire and the rebuilding (*g*).

Profits on cargo.—When the insured shipped a cargo of goods to

(*z*) *Worthington* v *Curtes*, 1 Ch. D. 419, 45 L J. Ch. 259, 33 L. T. N. S. 828, 24 W. R. 228.

(*a*) *Shilling* v. *Accidental, ubi sup. Howard* v. *Refuge Co.*, 54 L. T. 644.

(*b*) Bliss Life Assurance, 17.

(*c*) *Lord* v. *Dall*, 12 Mass 115 (118, (3rd edition). *Elkhart Mutual Aid, &c. Association* v. *Houghton*, 53 Am. Rep. 515.

(*d*) *Rombach* v. *Piedmont Co*, 48 Am. Rep. 239.

(*e*) *Lucena* v. *Crawford*, 2 N. R. at 824, 1 Taunt. 325.

(*f*) *M'Swiney* v. *Royal Exchange, &c., Co.*, 14 Q. B. 646, 19 L. J. Q. B. 222 13 Jur. 489. *Stockdale* v. *Dunlop*, 6 M. & W. 224, 9 L. J. N. S. Ex. 83 *Stock* v. *Inglis*, 12 Q. B. D. 564. 10 App. Cas. 263.

(*g*) *Sun Fire* v. *Wright*, 3 N. and M. 819, 1 A. & E. 621. *Wright* v. *Pole*, 1 A & E 6?1. *Wilson* v. *Jones*, L. R. 2 Ex. 139, 36 L. J. Ex. 78, 15 L. T. N. S, 669, 15 W. R. 435.

[2] Relationship of nephew and aunt is not an insurable interest. Corson's Appeal, 113 Pa. St. 438.

be carried on a trading voyage, he was held to have an insurable interest in the profits to arise from the cargo (*h*).

Freight.—A shipper has an insurable interest in freight (*i*), [*42] and a consignee or a factor may effect an insurance in *respect of his commission if the consignment takes place (*k*).

Prize.—So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. In these cases there is either an absolute or special property in possession (*l*).

Bankrupt. Execution debtor.—A bankrupt retains an insurable interest in his estate (*m*). And in America a debtor after execution has been held to have an insurable interest, since liability continues till after sale, and the property out of which his debt might be satisfied would be gone in case of fire (*n*).

There must be interest at time of insuring and of loss.—In a case of fire insurance, the party insured must have an insurable interest at the date of the policy and at the time the fire happens, and, therefore, where a lessee insured and after the lease had expired the house was burnt down and the policy was assigned subsequently to the fire, the assignee was held not entitled to obtain the money from the insurance office (*o*).

Theatrical manager and actor.—A theatrical manager has an insurable interest in the life of an actor engaged by him (*p*).

Heir of person non compos.—The heir of a person who through idiocy or lunacy is incompetent to make a will has not such an interest in the life of such person as to enable him to insure his life, and thus provide against possible loss of the inheritance through his recovery (*q*).

Borrow from insurer.—An insurance company lending [*43] money may validly *agree with the borrower that he shall insure his life to a greater amount than the debts, and assign the policy to the company as security (*r*). But in such case the interest supporting the policy is the debtor's, not the creditor's.

Employer and employed.—A contract of employment at a salary

(*h*) *Eyre* v. *Glover*, 16 East, 218. *Hodgson* v. *Glover*, 6 East 316. *Barclay* v. *Cousins*, 2 East 546.

(*i*) *Thompson* v. *Taylor*, 6 T. R. 478. *Flint* v. *Fleming*, 1 B. & Ad. 45. *Devaux* v. *Anson*, 7 Scott 507, 5 Bing. N. C. 519.

(*k*) *King* v. *Glover*, 2 B. & P. New Rep. 206. *Knox* v. *Wood*, 1 Camp. 543.

(*l*) *Stockdale* v. *Dunlop*, 9 L. J. N. S. Ex. 83, 6 M. & W. 224, per Parke, B.

(*m*) *Marks* v. *Hamilton*, 7 Ex. Rep. 323, 21 L. J. Ex. 109, 18 L. T. 260, 16 Jur. 152. *Goulstone* v. *Royal*, 1 F. & F. 276. *Lazarus* v. *Commonwealth Co.*, 86 Mass. (19 Pickering) 81.

(*n*) *Insurance Co.* v. *Thompson*, 95 U. S. (5 Otto) 547.

(*o*) *Sadlers Co.* v. *Badcock*, 2 Atk. 554, 1 Wils. 10. *Lynch* v. *Dalzell*, 4 Bro. P. C. 431.

(*p*) Law Mag. vol. 22, N. S. 347. *Parsons* v. *Bignold*, 13 Sim. 518, 15 L. J. Ch. 379, 7 Jur. 591.

(*q*) *Lucena* v. *Crawford*, 2 N. R. 324, 1 Taunt. 325.

(*r*) *Downes* v. *Green*, 12 M. & W. 481, 8 Jur. 899.

for a term of years gives the employed an insurable interest in the employer's life during the unexpired portion of the term (*s*).

Railway companies' liability for fire to houses near line.—In America, railway companies, in respect of their liability for fire to houses or property near the line, have an insurable interest in such houses, unless by statute or otherwise they are specially exempted from such liability. In England the liability is less extensive (*t*).

Employers and workmen. Employers of clerks, &c.—Employers of labour, when liable to their workmen, whether by Common Law or Statute (*u*), have an insurable interest in the safety of their workmen. Employers of clerks and others, whom they must in the course of their business entrust with money or thing of value, can insure against loss through their dishonesty (*x*).

Interest must be enforceable.—The interest will not amount to an insurable interest unless it be one capable of being enforced under a binding contract or a legal liability; a mere engagement binding in honour would not suffice (*y*).

Amount recoverable is the value of interest at date of policy.—The sum recoverable under a life policy *sur autre vie* is limited to the amount or value of the insured's insurable interest in the life insured at the date of the *policy (*z*). Consequently if the assured [* 44] insures the same interest with several insurers, he can recover from them all only the value of his interest, and therefore if he receives that value from one of them he can claim nothing from the others (*a*).

The interest must be lawful.—The assured's interest must be lawful, and therefore interests in illegal voyages cannot be insured if the illegality is known to the assured (*b*), and all gambling interests are excluded; such, for instance, as insuring lottery tickets (*c*) or a policy on the sex of a person (*d*). Seamen's wages are not insurable (*e*); and where, in consideration of 40 guineas for £100, and so,

(*s*) *Hebden* v. *West*, 3 B. & S. 579, 32 L. J. Q. B. 85, 7 L. T. N. S. 854 11 W. R. 423, 9 Jur. N. S. 747.

(*t*) May Ins. 98. *Jones* v. *Festiniog Ry.*, L. R. 3 Q B. 733.

(*u*) 43 & 44 Vict. c. 42. *Henry-Rifle Barrel Co.* v *Employers' Liability Corporation*, Q. B. D. 27th Mar. 1884. *Ratcliffe* v. *Ocean, &c., Co.*, Butt, J., Leeds Spring Assizes, 1884.

(*x*) *Towle* v. *National Guardian*, 5 L. T. N. S. 193, 30 L. J. Ch. 900, 7 Jur. N. S. 1109, 10 N. R. 49.

(*y*) *Stockdale* v. *Dunlop*, 6 M. & W. 224, 233, 9 L. J. N. S. Ex. 83. *Stainbank* v. *Fenning*, 11 C. B. 51, 15 Jur. 1082, 20 L. J. C. P. 226, *Stainbank* v. *Shepherd*, 13 C. B. 418 17 Jur. 1032, 22 L. J. Ex. 341.

(*z*) 14 Geo. III. c. 48, s. 3.

(*a*) *Hebdon* v. *West*, 3 B. & S. 579, 32 L. J. Q. B 85, 11 W. R. 423, 7 L. T. N. S. 854, 9 Jur. N. S. 547. *Law* v. *London Indisputable Life Policy Co.*, 1 Kay & J. 223, 24 L J. Ch. 196, 24 L. T. 208, 1 Jur N. S. 179, 3 W. R. 155.

(*b*) *Wilson* v *Rankin*, L. R. 1 Q. B. 163, 35 L. J. Q. B. 87, 13 L. T. N. S. 564, 14 W. R. 198. *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581, 585, 31 L T. N. S. 31, 22 W. R. 914 *Cunard* v. *Hyde*, 2 E. & E. 1, 29 L. J. Q. B. 6.

(*c*) *Jacques* v. *Golightly* (1776), 2 Wm. Bl. 1073.

(*d*) *Roebuck* v. *Hamerton*, 2 Cowp. 737.

(*e*) *Webster* v. *de Tastot*, 7 T. R. 157, 3 Kent Comm. 269.

according to that rate, for any greater or less sum, several persons, each for themselves, severally agreed to pay the several sums set opposite their names in case Brazilian mining shares should on or before a certain day be done at or above a certain sum, the contract was held to amount to a policy of insurance and to be illegal (*f*).

Lawful and unlawful interests in same policy.—American writers raise the question whether, if lawful and unlawful interests are insured together, the whole or only part of the policy is vitiated. This depends on whether the contract is separable or not, just as the question whether premiums are in part returnable depends on whether they can consistently with the nature of the risk be apportioned (*g*).

Money won at play.—The holder of a note given for money [*45] won at play *has not an insurable interest in the life of the maker of the note (*h*).

Difference between policy and wager.—Mr. Justice (now Lord) Blackburn said, "I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to" (*i*).

Wager policy.—A wager in the form of a policy upon the sex of a person is a wagering policy within 14 Geo. III. c. 48, for a contract in the form of a policy does not cease to be a policy because the subject-matter of the insurance is not exposed to peril (*k*).

Wager policy premiums not recoverable.—And where a son insured the life of his father, in which he had no insurable interest, and paid the premiums for some years, and the father, who at first had no knowledge of the insurance, became aware of it, and gave notice to the company that he objected to its continuance, it was held that the policy was a wagering policy, and therefore the son could not recover the premiums (*l*).

Tontine.—A life policy upon the tontine principle is not void as a gaming contract (*m*).

Policy assigned to third person who pays premiums not a wager policy.—A man applied to the local agent of an insurance company for insurance on his own life. His proposal was accepted, and the policy was prepared and sent to the agent. The applicant did not

(*f*) *Paterson* v. *Powell*, 2 L. J. N. S. C. P. 18, 9 Bing. 320, 620, 2 Mo. & Sc. 399, 773.

(*g*) May Ins. 81.

(*h*) *Dwyer* v. *Edie*, 2 Park Ins. (8th ed.) 914.

(*i*) *Wilson* v. *Jones*, L. R. 2 Ex. 150, per Blackburn, J., 36 L. J. Ex. 78, 15 L. T. N. S. 669, 15 W. R. 435.

(*k*) *Roebuck* v. *Hamerton*, 2 Cowp. 737.

(*l*) *Howard* v. *Refuge Friendly Society*, 54 L. T. 644.

(*m*) *Simons* v. *New York Life*, 38 Hun. (N. Y.) 317.

pay for it, so a third person paid the premium and had his name filled into a blank assignment which had been left with the agent by the original applicant, and the majority of the *Su- [*46] preme Court of Canada held that this was not a wager policy (*n*).

Different kinds of interest need not be specified.—A person who has different kinds of interest in property may cover them all by one insurance without stating in the policy the number or nature of the interests (*o*). But the subject-matter of the insurance must be correctly described (*p*).

Special or qualified interest sufficient.—An insurable interest in mercantile language does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance (*q*).

Possession of property will suffice.—Property without possession will constitute insurable interest (*r*), and a person in possessien as the apparent or presumptive owner has such an interest (*s*).

Tortious disseizor.—In America a tortious disseizor has been held to have an insurable interest (*t*).

Goods sold but not delivered.—Even where a policy is "on goods sold but not delivered," cases may arise in which the assured is not entitled to recover; for if the legal title has vested in the vendee, the goods are in law delivered even if not removed (*u*); but if the words "not removed" are in the policy, the insurers are liable (*x*).

Property in goods purchased remaining in vendor.—A person who bargains for, and takes into his possession, an article of personal property on a hiring *agreement, one of the terms of [*47] which agreement is that the property shall remain with the seller until the purchase money be paid, has an insurable interest in the property, though the money is not fully paid (*y*).

Building on another's land.—A man insuring a house in his possession built on the wrong land owing to an unskilful survey can recover on his policy, if he has insured *bonâ fide* (*z*).

After-acquired goods.—It has been decided in Canada that policies cover after-acquired goods which have been substituted for those

(*n*) *Vezina* v. *New York Life*, 6 Canada (S. C.) 80.
(*o*) *Carruthers* v. *Sheddon*, 6 Taunt. 14.
(*p*) *Crowley* v. *Cohen*, 8 B. & Ad 478, 1 L. J. N. S. K. B. 158.
(*q*) *De Forest* v *Fulton Fire*, 1 Hall (N. Y. Sup. Ct.) 94, 115, which examines the cases very fully, and states their effect well.
(*r*) *Joyce* v. *Swann*, 17 C. B. N S. 84, 104.
(*s*) *Marks* v. *Hamilton*, 7 Ex. 323, 21 L. J. Ex. 109, 18 L. T. 260, 16 Jur. 152. *Lingley* v. *Queen Ins. Co.*, 1 Han. (New Bruns.) 280.
(*t*) *Mayor of New York* v. *Brooklyn Fire, &c, Co.* 41 Barb. (N. Y.) 231. *Sweeney* v. *Franklin Co*, 20 Penn 337.
(*u*) *Lockhart* v. *Cooper*, 42 Am. Rep. 514.
(*x*) *Waring* v. *Indemnity Fire Insurance Co*, 45 N. Y. 606, 6 Am. Rep. 146.
(*y*) *Reed* v. *Williamsburg City Fire Insurance Co.*, 74 Maine 537.
(*z*) *Stevenson* v. *London and Lancashire Assurance Co.*, 26 U. C. (Q. B.) 148.

originally insured (*a*). *Continuity of interest unnecessary.*—And the interest on the subject-matters insured need not be continuous, since absence of continuity only means absence of risk (*b*).

Lost or not lost.—It is no answer to a claim on a policy on goods (*lost or not lost*) that the interest in them was not acquired until after the loss (*c*).

Risk without property will suffice. So will probability of loss.—Although risk and property generally go together (*d*), they are not necessarily associated; and the risk alone will suffice to sustain the insurance. The peril must be such that its happening might bring upon the assured a pecuniary loss, but it is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence were it to happen (*e*).

Interest must be valuable.—As before mentioned, an insurable interest must be something more than mere anxiety regarding the safety of the thing insured, or hope of profit or advantage in [*48] relation thereto; it need not amount to property in the *thing insured, for if through special circumstances the property has not passed to the assured, yet if he has any beneficial right which is of a pecuniary value in the subject-matter of the insurance, or if it be at his risk, he has an interest which he may validly insure (*f*). *Stockholders no insurable interest in corporate property.*—Nevertheless, the stockholders in a corporation have no insurable interest in the property of the corporation (*g*). *General partner may recover whole insurance.*—But if property belonging to a limited partnership, in which there are a general and a special partner, is insured in the name of the general partner, which is the name used by the partnership, such general partner is entitled to recover the full amount of the loss, and not merely the value of his interest in the property (*h*).

Expectancy—In the case of an agreement to sell an expectancy under a will for so much money, and to repay the purchase-money if the expectation was not realized, the insured would have no more interest in the life or death of the person from whom the expectation arose than was created by the agreement to sell; but it has been held that he would have an insurable interest (*i*).

Perfect legal interest not necessary.—An insurable interest does not mean a perfect legal interest. If it did, there are some buildings

(*a*) *Butler* v. *Standard*, 4 U. C. (App.) 391.
(*b*) *Crozier* v. *Phœnix*, 2 Han. (New Bruns.) 200.
(*c*) *Sutherland* v. *Pratt*, 11 M. & W. 296, 311.
(*d*) *Anderson* v. *Morice*, L. R. 10 C. P. at 619, per Blackburn, J., 44 L. J. C. P. 10, 341, 31 L. T. N. S 605, 33 do. 355, 23 W. R. 180, 24 do. 30.
(*e*) *Ibid.*, 1 App. Cas. 742, per Lord O'Hagan, 46 L. J. C. P. 11, 35 L. T. N. S. 566, 25 W. R 14.
(*f*) *Joyce* v. *Swann*, 17 C B. N. S. 84.
(*g*) *Riggs* v. *Commercial Union Co*, 51 N. Y. (Sup. Ct.) 467.
(*h*) *Clement* v. *British American Co.*, 141 Mass. 298.
(*i*) *Cook* v. *Field*, 15 Q. B. 460, 19 L. J. Q. B. 441, 16 L. T. O. S. 2, 14 Jur. 951.

on which it would be difficult for any one as owner to effect a valid insurance. In the case below cited (*k*) plaintiff had contracted to purchase the property insured, and had failed in making his payment punctually, but was proceeding in equity to compel performance by the vendor, and it was held that he had an insurable interest. There must be a valid subsisting contract capable of being enforced between the parties themselves in order to constitute an insurable interest or right of action against the insurer.

**Interest in respect of advances under parol agreement conferring equitable lien.*—[*49] The contract, however, need not be such as to pass the property in the thing insured, nor need there be such a transmutation of possession as to create a lien in the legal technical sense of that word. It is sufficient if the relationship between the parties is such as to constitute an actual equitable interest in the thing insured, and such an equitable interest will constitute an insurable interest. In a case decided in the Supreme Court of Canada (*l*), C. made advances to B. upon a vessel then in course of construction, upon the faith of a verbal agreement with B. that after the vessel should be launched she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When the vessel was well advanced, C. disclosed the facts and nature of his interest to the agent of the insurance company, and the company issued a policy of insurance against loss by fire to C. The vessel was still unfinished and in B.'s possession when she was burned. It was held on these acts that C.'s interest was an equitable interest, which was insurable, and therefore C. was entitled to recover (*m*). Chambre, J. (whose views were ultimately adopted by the House of Lords), said, in *Lucena* v. *Crawford*, 3 B. & P. p. 104: "I am not disposed to question the authorities in general; on the contrary, there appears to me to have been great propriety in establishing the contract of insurance *whenever the interest declared upon was, in the common understanding of mankind, a real interest in or arising out of the thing insured*, or so connected with it as to depend on the safety of the thing insured, and the risk insured against, without much regard to technical distinctions respecting property, still, however, excluding mere speculation or expectation, and interests created not otherwise than by gaming" (*n*).

*The spirit of 19 Geo. II. c. 37, only requires that the [*50] policy shall not be a gaming policy (*o*). *Quantum of interest.*—The question upon which the validity of the contract depends is not the exact quantum of the interest of the assured at the time the contract was entered into, but did the defendants mean to game?

(*k*) *Milligan* v. *Equitable &c., Co.*, 16 U. C. (Q. B.) 314.
(*l*) *Clarke* v. *Scottish Imperial*, 4 Canada (S. C.) 192, and *Johnson* v. *New Zealand Co.*, 10 Victoria L. R. 154.
(*m*) *Ibid.*
(*n*) *Ebsworth* v. *Alliance Marine Insurance Co.*, L. R. 8 C. P. 596, 619, 29 L. T. N. S. 479.
(*o*) *Page* v. *Fry*, 2 B. & P. at p. 248, per Chambre, J.

or was there not a loss against which they might indemnify themselves by a policy of insurance—not a certain, but a possible loss? The case below cited was one in which the Court of Admiralty might have decreed the assured to pay damages and costs, and that was held sufficient to give an insurable interest (*p*).

Whoever has an interest which the law will recognize in the preservation of a thing, or the continuance of a life, may insure that thing or that life (*q*).

Any one interested in buildings may insure.—The insurance of buildings may be affected by any one interested therein, and he can recover to the extent of the injury to his interest.

Fee simple. Yearly, &c., tenants.—The owner of the fee simple may of course insure, possessing as he does the largest possible interest. So may a life, a yearly, or even a weekly tenant insure in virtue of his interest in the property, and recover the value of such interest.

Assured can retain only value of own interest.—If in any of these cases of limited ownership an insurance were effected under which the limited owner recovered the full value of the property, he could not, it seems, retain such value for his own use, because the contract of fire insurance, like that of marine insurance, is one of indemnity. In *Castellain* v. *Preston* (*r*), Bowen, L. J., said,

"It is an illusion to suppose that the assurerd can in any [*51] case recover more than his loss. We must *look at the ordinary business rules. It is well known, of course, that a person with a limited interest may insure, and recover the whole value of the thing insured, but then his policy must be apt for the purpose, and he must have intended to so insure (*s*). Again, a person may insure for himself, or for himself and others, as in the case of carriers and wharfingers, or to take the case of a mortgagee, he is entitled to insure for other parties; but if he only insures his own interest, he can only hold the damage to his own interest. That principle applies here. It was contended that a tenant from year to year may always recover the full value of the premises insured; but, although that contention would appear to be supported by the language of Lord Justice James in *Rayner* v. *Preston*, I cannot assent to it. It may be that the insurance companies do not as a rule take the trouble to ascertain the exact interest of the assured because in most cases the insurance is for the benefit of all concerned; but if a case were to occur in which a yearly or a weekly tenant were to insure, meaning only to cover his own interest, he could not recover and hold the whole value of the house. It is true that in most cases the claim of the tenant from year to year, or for years, cannot be answered by handing over to him what may be the marketable

(*p*) *Boehm* v. *Bell*, 8 T. R. 162, per Lawrence, J.
(*q*) Dalloz, 1868, pt. 1, 388. *Branford* v. *Saunders*, 25 W. R. 650
(*r*) 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31, W. R. 558.
(*s*) *Johnson* v. *New Zealand, &c., Co.*, 10 Victoria L. R 154. *Howes* v. *Dominion Fire Co.*, 8 Ontario (App.) 644.

value of his property, and the reason is that he insures more than the marketable value of his property, and he loses more than the marketable value of his property; he loses the house in which he is living, and the beneficial enjoyment of the house, as well as its pecuniary value. A man cannot be compensated simply by paying him the marketable value of his interest. But it does not follow that he gets or can keep more than he has lost." (*t*).

**Joint-tenants.*—A joint-tenant or a tenant in common has [*52] such an interest in the entirety as will entitle him to insure the whole (*u*).

Husband in property to wife's separate use.—A husband has an insurable interest in property settled to his wife's separate use, they residing together and sharing in the use of the property (*x*).

An appurtenant to freehold must be recovered for as such.—A building insured as appurtenant to the freehold can only be recovered for as such. Therefore when in such a case the assured's title to the freehold has failed, he cannot maintain a claim in respect of such a building on the ground of its being moveable property, and so distinct from the freehold (*y*).

Rent.—Tenants have an insurable interest in the rent which they are liable to continue paying after the premises are destroyed by fire (*z*). But if the contract of tenancy relieves them from liability they will not have an insurable interest. In Scotland, where if the premises are destroyed or rendered useless for the purpose for which he took them, the tenant can surrender them, he consequently has no insurable interest in his rent (*a*).

Bailees.—A common carrier, pawnbroker, factor, broker and wharfinger have an insurable interest in the goods entrusted to them; but if they insure the goods to their full value and receive it, they will, after satisfying their own claims, be trustees of the balance for the real owners (*b*).

*And in the recent case of *Castellain* v. *Preston* (*c*) Bowen, [*53] L. J., said: "It is well known in marine and fire insurance, that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions—1st, the form of his policy must be such as to enable him to recover the

(*t*) *Castellain* v. *Preston*, 11 Q. B. D. 400, 401, per Bowen, L. J., 49 L. T. N. S. 29, 52 L. J. Q. B. 366, 31 W. R. 557.

(*u*) *Page* v. *Fry*, 2 B. & P. 240. *Inglis* v. *Stock*, 10 App. Cas. 274.

(*x*) *Goulston* v. *Royal*, 1 F. & F. 276.

(*y*) *Sherbonneau* v. *Beaver Mutual Fire Insurance Co.*, 33 U. C. (Q. B.) 1, 30 U. C. (Q. B.) 472.

(*z*) *Marshall* v. *Schofield*, 47 L. T. N. S 406, 31 W. R. 134, 52 L. J. Q. B. 58.

(*a*) *Allen* v. *Markland*, 20 Sc. Law Rep. 267. *Duff* v. *Fleming*, 8 C. S. C. (3rd series) 769

(*b*) *Sidaways* v. *Todd*, 2 Stark. 400. *Armitage* v. *Winterbottom*, 1 M. & G. 130.

(*c*) *Castellain* v. *Preston*, 11 Q. B. D. 398, and *vide supra*, p. 50.

total value; and 2nd, he must intend to insure the whole value at the time."

Consignees. Consignee in trust.—The question has often been discussed whether factors or consignees for sale have an implied authority to insure for their principle: and there seems no doubt that they may insure upon their own account to the extent of their own interest (*d*). They may insure both for themselves and for their principal, but are not positively bound to insure unless they have received instructions to do so, or have promised to insure, or the usages of trade or the habit of dealing between them and their principals raises an implied obligation to insure (*e*). Consignees having a power to sell, manage, and dispose of the property subject to the rights of the consignor, and even consignees with a mere naked right to possession, may insure if they state the interest to be in their principal (*f*).

But it is doubtful whether a consignee insuring in his own name could in case of loss recover the whole value of the property from the underwriter and hold the surplus beyond his own advances upon trust for the benefit of his principals (*g*).

[* 54] *If, however, consignees did insure in their own names to the full value of the property, the consignors might even after loss ratify the insurance, which would then enure for their benefit (*h*).

Consignee in trust.—A creditor has an insurable interest in goods voluntarily consigned by his debtor to a third person in trust for such creditor (*i*).

The firm of De la Torre in Spain consigned goods to Dubois & Son in London, and endorsed the bill of lading to them, accompanied by a letter directing them to note the goods for certain creditors of De la Torre. It was held that Dubois & Son were to be considered as trustees for the creditors from the time the goods were put on board the ship, and that the creditors had an insurable interest in the goods (*k*).

Merchant and consignee.—A merchant abroad, having effects in the

(*d*) *Ebsworth* v. *Alliance, &c.*, L. R. 8 C. P. 596, 29 L. T. N. S. 479.

(*e*) *Ebsworth* v. *Alliance, supra. Silverthorne* v. *Gillespie*, 9 U. C. (Q. B.) 414. *Gooderham* v. *Marlett*, 14 U. C. (Q. B.) 228. *Wolfe* v. *Horncastle*, 1 B. & P. 316, Story Agency, s. 111 *Conway* v. *Gray*, 10 East 536. *Robertson* v. *Hamilton*, 14 East 522. *Knox* v. *Wood*, 1 Camp. 543. *Fragano* v. *Long*, 4 B. & C. 219. *Neale* v. *Reed*, 1 B. & C. 657.

(*f*) *Lucena* v. *Crawford*, 2 B. & P. N. R. 324, per Lord Eldon, 1 Taunt. 325. *Castellain* v. *Preston*, 11 Q. B. D. 398 *Ebsworth Alliance*, L. R. 8 C. P. at 623, 29 L. T. N. S. 479, *supra*.

(*g*) *Ebsworth* v. *Alliance*, and *vide supra*, p. 50. *Castellain* v. *Preston*, L. R. 11 Q. B. D. 398, per Bowen, L. J.

(*h*) *Giffard* v. *The Queen &c., Co.*, 1 Hannay (New Brunswick) 432, 439. *Williams* v. *North China Co.*, 1 C. P. D. 757, 35 L. T. N. S. 884. *Hagedorn* v. *Oliverson*, 2 M. & S. 485.

(*i*) *Hill* v. *Secretan*, 1 B. & P. 315.

(*k*) *Ibid.*

hands of his correspondents here, may compel them to procure an insurance for him, or hand over the effects (*l*).

If a merchant here has been accustomed to procure insurances here for his correspondent abroad in the usual course of business, the latter has a right to expect his orders for insurances to be obeyed, unless the former give notice to discontinue the course of dealing (*l*).

If bills of lading are sent with directions to insure, they cannot be accepted without obeying the order to insure. Limiting the broker to too small a *premium, so that he cannot get [*55] a policy, amounts to disobedience (*m*).

If goods sent are mortgaged, and a direction to insure accompany the bill of lading and be not obeyed, foreclosure of the mortgage before receipt of the bill of lading will not alter the force of the direction (*m*).

Agent insuring consignee.—A person insuring as agent for another cannot recover as a principle on the policy. So a consignee suing for indemnity on a policy effected in his own name on another's goods consigned to him must show an insurable interest in such goods, and can only recover so far as he has interest (*n*). If he has a lien on the special goods, he can recover to the extent thereof.

If the goods are not at the risk of the consignee or purchaser until a certain event, he has no insurable interest in them until that event has happened (*o*); but in *Hagedorn* v. *Oliverson*, 2 M. & S. 485, the ship of the assured was held to be at risk, though he did not confirm the insurance thereof till after the loss.

Stoppage in transitu.—Where a sale takes place the vendee's title is liable to be defeated by the vendor's right to stop *in transitu* (*p*); and if that right is exercised, the vendee ceases from the time of its exercise to have any insurable interest in the goods, which therefrom cease to be at his risk (*q*).

Bailee.—If a bailee have no lien and no responsibility for the *safe custody of the goods entrusted to him, he has no [*56] insurable interest in himself, and can only insure on account of the persons interested, who may ratify such a contract; and it would seem that he can recover the full value of the property insured as trustee for the true owners (*r*) though the latter were una-

(*l*) *Smith* v. *Lascelles*, 2 T. R. 189, per Buller, J.

(*m*) *Smith* v. *Lascelles*, 2 T. R. 189, per Buller, J.

(*n*) *Cusack* v. *Mutual Insurance Co*, 6 Lr. Can. Jur. 97. *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*o*) *Anderson* v. *Morice*, 4 App. Cas. 742, 46 L. J. C. P. 14, 35 L. T. N. S. 556, 25 W. R. 14. See also *Lucena* v. *Crawford*, 2 B. & P. N. R. 269, 1 Taunt. 325, per Lord Eldon.

(*p*) As to the nature and conditions of the exercise of this right, see *Kendall* v. *Stevens & Co.*, 11 Q. B. D. 356.

(*q*) *Clay* v. *Harrison*, 10 B. & C. 99.

(*r*) *North British and Mercantile* v. *Moffatt*, L. R. 7 C. P. 25, 41 L. J. C. P. 1, discussing previously cited case, 20 W. R. 114, 20 L. T. N. S. 662.

ware of the insurance (*s*). If he has not possession, his lien has not arisen or is lost (*t*). Lord Eldon said, in *Lucena* v. *Crawford*, 2 N. R. 324: "I cannot agree to the doctrine that an agent may insure in respect of his lien to arise upon a subsequent performance of his contract. If he has a lien, he can insure the property in respect of it (*u*), as in the case of a repairer of a foreign ship" (*x*).

A carrier has an insurable interest—

A carrier has an insurable interest.—(i.) In respect of his responsibility to the extent to which he is responsible at common law (*y*), or under the Carriers Acts (*z*), or his own special contract (*a*), which responsibility lasts during transit, and for a reasonable time thereafter before delivery or awaiting delivery (*b*). Thereafter he is only an ordinary bailee (*c*), and not, as he is commonly called, an insurer.

(ii.) In respect of his lien on the goods for his charges (*d*).

[*57] *(iii) In respect of his possession, which will enable him to insure the whole value and recover it, subject to the rights of the owner to claim the benefit of his policy (*e*).

Carriers entitled to recover full value.—Where carriers insured against fire "goods their own and in trust as carriers," and one of the conditions of the policy was that "goods held in trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property," it was held that the plaintiffs were entitled to recover the full value of all goods, and that they might be considered as having insured the goods which they held in trust as carriers for the benefit of the owners, for whom they would hold the amount recovered as trustees, after deducting what was due in respect of their own charges upon the goods (*f*).

In America an action has been allowed by the owner of goods deposited with a forwarding agent to recover a proportionate part of an insurance effected by the latter on merchandise generally held in trust or on commission (*g*).

(*s*) But see *Martineau* v. *Kitching*, L. R. 7 Q. B. at 450, 41 L. J. Q. B. 227, 20 L. T. N. S. 836, 20 W. R. 769.

(*t*) *Ibid.* See also 1 Phillips 179.

(*u*) *London and North-Western Railway* v. *Glyn*, 28 L. J. Q. B. 188, 1 E. & E. 652, 7 W. R. 238, 33 L. T. 199. See Angell Insur. 114.

(*x*) 1 Phillips 179.

(*y*) *Forward* v. *Pittard*, 1 T. R. 27.

(*z*) *Riley* v. *Horne*, 5 Bing. 220 *Macklin* v. *Waterhouse*, 5 Bing. 212. *Carruthers* v. *Sheddon*, 6 Taunt. 14.

(*a*) *Phœnix Co.* v. *Erie Co.*, 10 Bissell (U. S. Circuit Ct.) 18. *Oakley* v. *Portsmouth, &c., Co.*, 11 Ex. 618, 25 L. J. Ex. 99.

(*b*) *Coggs* v. *Bernard*, 2 Raym. 909.

(*c*) *Waters* v. *Monarch*, 5 E. & B. 870, 25 L. J. Q. B. 102, 26 L. T. 217, 4 W. R. 245, 2 Jur. N. S. 375

(*d*) *Crowley* v. *Cohen*, 3 B. &. Ad. 478 1 L. J. N. S. K. B. 158.

(*e*) Parke, 567, 8th ed.

(*f*) *London and North-Western Railway Co.*, v. *Glyn*, 1 E. & E. 652, 28 L. J. Q. B. 188, 7 W R. 238, 33, L. T. 199.

(*g*) *Sitter* v. *Morris*, 13 Penn. 218.

Wharfinger.—A wharfinger is not at common law responsible for goods which are casually burnt on the premises (*h*), but sometimes a wharfinger or other bailee is liable to indemnify for fire by custom (*i*). When, however, no duty to indemnify or to insure is imposed upon the wharfinger or his firm, and there is no evidence that the insurance was made on the property or in the interest of the owner of the deposited goods, an insurance by one partner will not be taken to have been made in the course of the firm's business, nor will *the owner of the goods be allowed to recover [*58] from one partner the proceeds of a policy received by another (*k*).

Where a wharfinger insures goods as "in trust or on commission for which he is responsible," goods deposited with him and sold by the importer, and for which the wharfinger has given delivery warrants, cease to be at his risk, and he has no insurable interest therein after the date of such warrant (*l*).

Wharfingers, &c.—Wharfingers, warehousemen, and commission agents, having goods in their premises, may insure them in their own names, and in case of loss may recover the full amount of insurance for the satisfaction of their own claims first, and hold the residue for the owner (*m*).

Such insurance is not unusual, even when not ordered by the owners (*n*); and, when made, it enures to their benefit.

Factor's interest.—As to factor's interest in goods entrusted to him, see the Factor's Act (5 & 6 Vict. c. 39).

Commission agent.—A commission agent is to all the world but his principal for all intents and purposes the owner of the goods, and in an insurance in his own name on the goods, if the policy was so intended, he can recover the full damage, and not merely the amount of advances on the goods, with interest, and their mercantile commission and charges as factors (*o*).

**Agent to obtain advances.*—And an agent to obtain ad- [*59] vances for his principal on goods, if he render himself liable for any loss which may arise after their sale, has an insurable interest therein to the full amount of the loan (*p*).

(*h*) *Sidaways* v. *Todd*, 2 Stark, 401.

(*i*) *North British and Mercantile* v. *London, Liverpool, and Globe Co.*, 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. N. S. 629.

(*k*) *Armitage* v. *Winterbottom*, 1 M. & G. 130.

(*l*) *North British and Mercantile* v. *Moffatt*, 41 L. J. C. P. 1, L. R 7 C. P. 25, 25 L. T. N. S. 662, 20 W. R. 114. *Lockhart* v. *Cooper*, 42 Am. Rep. 514.

(*m*) *Armitage* v. *Winterbottom*, 1 M. & G. 130. *Waters* v. *Monarch Co.*, 5 E. & B. 870, 25 L. J. Q. B. 102, 26 L. T. 217, 4 W. R. 245, 2 Jur. N. S. 375. *London and North-Western Railway* v. *Glyn*, 1 E. & E. 652, 28 L. J. Q. B. 188, 7 W. R. 238, 33 L. T. 199. *De Forest* v. *Fulton Fire*, 1 N. Y. Sup. Ct. (Hall) 94, 130, 136. *Sitter* v. *Morrs*, 13 Penn. St. 219.

(*n*) *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 3 Otto (93 U. S.) 527, 543.

(*o*) *De Forest* v. *Fulton Co.*, 1 N. Y. Sup. Ct. (Hall) 94.

(*p*) *O'Connor* v. *Imperial*, 14 Lr. Can. Jur. 219.

policies are sometimes issued to factors or to warehousemen intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge. It will make no difference if the factors or parties are a company forbidden by their charter to insure the goods, which only prevents them taking risk by the bailment (*q*).

Meaning of "in trust."—Goods the assured's own, and "in trust or on commission," were insured by a policy against fire, the assured being a wharfinger and warehouseman who had in his warehouse goods belonging to his customers, which was deposited with him in that capacity, and on which he had a lien for his charges for cartage and warehouse rent, but no further interest of his own. No charge was made to his customers for insurance, nor were they informed of the existence of his policy. The plaintiff's warehouse was burnt, with all the goods in it, and the company paid the value of his own goods and the amount of his lien on his customers' goods, but refused to pay the amount of the customers' interest in the goods beyond the lien. The Court, however, decided that the goods of the customers were in trust within the meaning of the policy, and that assured was entitled to recover the entire value, and would be entitled to apply so much to cover his own interest, and would be trustee for the owners as to the rest. In giving judgment, Lord Campbell, C. J., said: "What is meant in these policies by [*60] goods in trust? I think it *means goods with which the assured were entrusted, not goods held in trust in the strict technical sense" (*r*).

Goods "in trust."—If a policy contains the condition that goods held in trust must be insured as such, otherwise the policy will not cover them, the following test may be applied to determine whether the goods are held in trust and come within the condition. If there is reserved to the bailor the right to claim a re-delivery of the property deposited, the bailment is generally withinl the condition and the property held on trust. But where there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for a return of the identical subject-matter in its original or an altered form, this is a transfer of the property for value, and not a delivery in trust (*s*).

Insurer's liability limited to that of assured.—"Goods the assured's own in trust or on commission for which they are responsible" were insured by a policy against fire. The goods were destroyed by fire, and the question whether they were covered by the policy

Blanket and floating policies by special owners.—Blanket and floating

(*q*) *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 3 Otto (93 U. S.) 527, 541.

(*r*) *Donaldson* v *Manchester Ins.*, 14 C. S. C. (1st series) 601. *Waters* v. *Monarch, &c.*, 5 E & B. 870, 25 L. J. Q. B 102, 26 L. T. 217, 4 W. R. 245.

(*s*) *South Australian* v. *Randell*, L R. 3 P. C. 101, 22 L. T. N. S. 843, 6 Moore P. C. N. S. 341. *Baxter* v. *Hartford Co.*, 11 Bissell (U. S.) 806.

came before the Court for determination. In giving the judgment of the Court, Keating, J., after referring to the form of the policies in the cases of *Waters* v. *Monarch, &c., Co.*, (*t*) and *L. & N.-W. Co.* v. *Glyn* (*u*), said: "It will be observed that the wording in the present policy is essentially different, for whilst in the cases referred to the insurance extended to goods 'in trust or on commission generally,' in the present case it is expressly limited to 'goods in trust or on commission, for which they (the assured) are responsible.' In *L. & N.-W. R. Co.* v. *Glenn*, Erle and Hill JJ., had thrown out that if insurance companies wished in future to limit their responsibility to the *responsibility of the assured, they [*61] must employ express words to that effect. It seems to us that the present plaintiffs (the insurance company) have done so in this policy, and have expressly limited their liability to such goods as were held in trust by the assured and for which they were responsible. It follows that the goods in question for which the assured were not responsible were not covered by the policy, and consequently that the insurance company are entitled to the judgment of the court" (*x*).

Where deposit of goods amounts to a sale, they are not held in trust.—Where corn was deposited by farmers with a miller to be stored and used by the miller as part of the ordinary stock of his trade, and was by him mixed with other corn deposited with him for a similar purpose, the farmers having the option of claiming at any time an equal quantity of wheat of the like quality or its value in cash, it was held that the transaction was virtually a sale and not a bailment by the farmers to the miller, and that therefore the miller could claim under a policy of insurance as for his own property, and that it was not necessary to be described as goods held in trust (*y*).

Goods with venders at buyers' risk.—Where goods remaining with the vendors at the buyers' risk, by agreement between them and their customers, were burnt, and at the time of the fire the vendors had floating policies of insurance which covered "goods on the premises, sold and paid for but not removed," but they had no understanding with their customers as to any insurance, and the amount of insurance-money which the venders received from the insurance company was not sufficient to cover the loss of their own goods exclusive of the goods sold, it was held that, as there was no contract between the vendors and their customers as to insurance, the *vendors were under no obligation in the matter, [*62] and were entitled to appropriate to their own losses the whole sum received from the insurance office (*z*).

(*t*) 5 E. & B. 870, 25 L. T. Q. B. 102, 26 L. T. 217, 4 W. R. 245.

(*u*) 28 L. J. Q. B. 188, 1 E. & E. 652 33 L. T. 199, 7 W. R. 238.

(*x*) *North British and Mercantile, &c., Co.*, v. *Moffatt*, 25 L. T. N. S. 662, L. R. 7 C. P. 25, 41 L. J. N. S. C. P. 1, 20 W. R. 114.

(*y*) *South Australian Co.* v. *Randell*, L. R. 3 P. C. 101, 6 Moore P. C. N. S. 341, 22 L. T. N. S. 843. *Todd* v. *Liverpool, &c.*, 18 U. C. (C. P.) 192.

(*z*) *Dalglish* v. *Buchanan*, 16 C. S. C. (2nd series 332. *Martineau* v. *Kitching*, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. N. S. 836, 20 W. R. 769.

Assured may have insurable interest in goods not separated from bulk, but which are at his risk.—The purchaser of barrels of oil not yet actually identified and separated from other barrels of oil stored in the same place has been held in Canada to have an insurable interest as owner of so many barrels as he insured (*a*), on proof that, at the time of getting the warehouse receipt and of the fire, goods to the amount of the brand named in the receipt were in store (*b*). And in this country the purchasers of goods will have an insurable interest therein if they are at his risk, even though they have not been specifically appropriated to him prior to the loss (*c*).

Insurable interest without liability to pay.—A man may even have an insurable interest in goods for which he has neither paid nor become liable to pay (*d*).

Where liability to pay there insurable interest. Liability to loss is insurable interest. Undivided interest.—A person certainly has an insurable interest in goods if he is liable to pay for them, whether he has the property in them or not. And in the case of *Inglis* v. *Stock* in the House of Lords, which decides this proposition, Lord Blackburn says, "In order to recover against the underwriter, the assured must show that he suffers loss in respect of the thing insured" (*e*). And in the same case the same learned lord held that an undivided interest in a parcel of goods constitutes an insurable interest just as much as if it were an interest in every portion of the goods (*f*).

[*63] And Lord Esher, M. R., when the same case was before the Court of *Appeals, said, "It is the duty of a Court always to lean in favour of an insurable interest, if possible, for after underwriters have received the premium, the objection that there was no insurable interest is often as nearly as possible a technical objection, and one who has no real merit as between the assured and insurer" (*f*). And the insurers have no right to call on the assured to exercise a possible option to be released from the contract under which the insurable interest arises (*g*).

Manufacturer.—A person who has contracted to make an insurable thing for another has an insurable interest therein until it is complete or passes to the person to whose order it is made, since he cannot get paid till it is completed, in the absence of special stipulations (*h*). Thus where there was contract to put machinery

(*a*) *Matthewson* v. *Royal Insurance Co.*, 16 Lr. Can. Jur. 45. *Clark* v. *Western*, 25 U. C. (Q. B.) 209.

(*b*) *Wilson* v. *Citizens, &c., Co.*, 19 Lr. Can. Jur. 175. *Stanton* v. *Etna*, 17 Lr. Can. Jur. 281.

(*c*) *Inglis* v. *Stock*, 10 App. Cas. 263.

(*d*) *Colonial Ins. Co.* v. *Adelaide Marine Co.*, 12 App. Cas. 138.

(*e*) *Inglis* v. *Stock*, 10 App. Cas. 270, 54 L. J. Q. B. 582, 52 L. T. 821, 33 W. R. 877.

(*f*) 10 App. Cas. 274. See also, as to an undivided interest, *Grandin* v. *Rochester Co.*, 107 Penn. 26.

(*f*) *Stock* v. *Inglis*, 12 Q. B. D. 571, 53 L. J. Q. B. 358, 51 L. T. 449.

(*g*) *Inglis* v. *Stock*, 10 App. Cas. 274.

(*h*) See *Grant* v. *Parkinson Insurance*, 3 B. & P. 85 note.

on defendant's premises and keep it in repair for two years, the price being payable on completion, but before completion (*i*) an accidental fire destroyed the machinery, the plaintiffs were held not entitled to recover for the work they had done (*j*).

Legal or equitable interests sufficient.—A *bona fide* equitable interest in property, the legal title whereto appears to be in another, may be insured. So may also the legal interest be insured, for the interest both of a trustee and of his *cestui que trust* is an insurable one (*k*).

Beneficial owner—sole owner.—If the beneficial title is insured, the fact that the legal *estate is outstanding in another [*64] will not vitiate a policy requiring that the assured should be entire, unqualified and sole owner for his own use and benefit (*l*).

Equitable interest.—And where the plaintiff had mortgaged his interest in the goods and freight to the defendant, the defendant might have insured the legal interest on his own account; and he might also have insured the equitable interest remaining in the plaintiff on the plaintiff's account (*m*).

Purchaser.—A purchaser of reality has also an insurable interest in the premises purchased from the signing of the contract, and before completion, since he has the whole equitable estate therein, and the property is at his risk; and if it is burned down, he must still pay for it (*n*). *Purchaser's interest.*—This interest exists equally though the purchaser is suing for specific performance (*o*), or for rescission of the contract, or has not found his purchase-money or any part thereof. Circumstances may arise to defeat his title to recover on his policy, such as failure to obtain specific performance, or decree to rescind the contract of sale (*p*). *Unpaid vendor.*—An unpaid vendor of property who is still in possession has an insurable interest, and may recover under a policy of fire insurance; for until he is paid he cannot tell for certain whether he will ultimately get his purchase-money or not. If he were not allowed

(*i*) American law hereon in May Ins. 116.

(*j*) *Appleby* v. *Myers*, L. R. 2 C. P. 651. *Claparede* v. *Commercial Union*, Feb. 1884, Q. B.

(*k*) *London and North-Western Railway* v. *Glyn*, 1 E. & E. 652, 1 Jur. N. S. 1004, 28 L. J. Q. B. 188, 33 L. T. 199, 7 W. R. 238. Ex parte, *Houghton*, 17 Ves. 253 Ex parte, *Yallop*, 15 Ves. 67. *Camden* v. *Anderson*. 5 T. R. 709. *Whyte* v. *Home Insurance Co.*, 14 Lr. Can. Jur. 80. *Lucena* v. *Crawford*, 2 N. R. 324, 1 Taunt. 325. *Tidswell* v. *Angerstein*, Peake, 151 (3rd ed.) 204. *Hill* v. *Secretan*, 1 B. & P. 315. *Waters* v. *Monarch*, 5 E. & B. 881, 25 L. J. Q. B. 102, 26 L. T. 217, 4 W. R. 245.

(*l*) *American Basket Cos.* v. *Farmville Insurance Co.*, 3 Hughes (U. S. Circ. Ct.) 251.

(*m*) *Smith* v. *Lascelles*, 2 T. R. 188.

(*n*) *Paine* v. *Meller*, 6 Ves. 349. *Poole* v. *Adams*, 12 W. R. 683, 10 L. T. N. S. 287. See *Rayner* v. *Preston*, 18 Ch. D. 1; 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547. But see *Sutherland* v. *Pratt*, 11 M. & W. 296.

(*o*) *Milligan* v. *Equitable*, 16 U. C. (Q. B.) 314. See *Columbian Insurance Co.* v. *Lawrence*, 2 Peters (U. S.) 25, 10 Peters (U. S.) 507, and *Etna Co.*, v. *Tyler*, 16 Wend. (N. Y.) 59.

(*p*) 4 Dalloz, 1868, pt. 1, 387.

to insure, and the property were destroyed by fire, he would have to rely entirely on the solvency of the purchaser (*q*).

[*65] *A man who had bought a locomotive, and had it on his own premises, was suing for rescission of the contract when he insured the locomotive. Decree of rescission was pronounced before the fire, but no notice of the action was given to the insurers, and it was held that the purchaser had an insurable interest in the locomotive, but that the benefit of the insurance enured to the vendor (*q*).

Unpaid vendor of goods.—An unpaid vendor of goods who insured them, and parted with them before loss, was held not entitled to recover on his policy, since his interest in the goods was wholly gone (*r*).

Paid vendor.—A vendor who has been paid for the property sold, but has not conveyed it, ceases from the time of payment to have any insurable interest in the premises, having only a bare legal estate without beneficial interest, lien, or liability. But if at the time of sale he has agreed to hold the purchaser insured or to insure for him, he would have an insurable interest, even after payment (*s*).

When vendor's interest ceases so as to disentitle him to policy-money.—The exact point at which the vendor's insurable interest ceases may be questioned. In *Collingridge* v. *Royal Exchange* (*t*) the vendor was unpaid, and had not conveyed. Lush, J., there seemed to consider actual conveyance the point at which the vendor's interest ceased. But in a New South Wales case decided in 1881 (*u*) it was held that a paid vendor who had not executed the conveyance had no real interest in the property, but only a bare legal estate, of which he was under contract to divest himself, and it was in that case

[*66] said that in the absence of anything to establish *the existence of a real interest (something to lose), or that there was an arrangement with the purchaser to keep the policy alive for his benefit, the vendor could not succeed. This decision was arrived at after full consideration of the authorities, and seems the more correct; and it anticipated the principle afterwards laid down in *Castellain* v. *Preston*.

Sale in fraud of creditors. Covenant to insure.—A vendor and purchaser have been held in Canada to have an insurable interest, although the sale was in fraud of creditors (*x*). A covenant to insure

(*q*) *Collingridge* v. *Royal Exchange Assurance*, 37 L. T. N. S. 525, 3 Q. B. D. 173, 47 L. J. Q. B. 32, 26 W. R. 112.

(*q*) 4 Dalloz, 1868, p. 1, 387.

(*r*) *Mollison* v. *Victoria Co.*, 2 N. Z. (Sup. Ct.) 177.

(*s*) *New South Wales Bank* v. *North British and Mercantile, &c., Co.*, 2 N. S. W. Law 239. *Castellain* v. *Preston*, 11 Q. B. D. 398.

(*t*) 3 Q. B. D. 173, 47 L. J. Q. B. 32, 37 L. T. N. S. 525, 26 W. R. 112.

(*u*) *New South Wales Bank* v. *North British and Mercantile Insurance Co.*, 2 N. S. W. Law 239. *Per contra*, see *Insurance Co.* v. *Up de Graff*, 21 Penn. 513.

(*x*) *Pettigrew's Case*, 28 U. C. (C. P.) 70.

gives an interest, and it has been held that where the covenant was to insure two sets of premises held for different terms for £2000, that the obligation to insure in that amount continued after the expiry of the shorter term (*y*).

Tests of interest on sale of goods.—Where the question of insurable interest or no insurable interest arises upon a bargain and a sale of goods, the real test to be applied in determining whether the party effecting the policy had such an interest is, were the goods at his risk? If they were, he would have an insurable interest. If they were not he would not have an insurable interest (*z*).

Trust policies legal. Names of trustees and c. q. t. must appear.—The Stat. 14 Geo. III. c. 48, does not prohibit a policy of life insurance from being granted to one person in trust for another where the names of both persons appear upon the face of the instrument (*a*). But an insurance on the life of A. by B., a creditor, as a trustee for C., who has no interest in the life, would be void (*b*).

Trustee may insure at expense of estate.—A trustee is justified in insuring in course of good management at the cost of the estate, and where the **cestui que trust* is an infant the trustee [*67] is empowered by statute to insure (*c*).

His insurance will be quâ trustee when with own money.—But if a trustee or executor insures, even though with his own money, and without the knowledge of his *cestui que trust*, he will be considered to have effected the insurance in his representative character; and, after deducting the amount of the premiums he has paid, he will have to account for the balance to the persons to whom the beneficial interest belongs (*d*)

Executor de son tort. Obligation of executor to insure.—An executor or administrator has an interest by virtue of his position as legal personal representative and guardian of the assets (*e*), and he has sufficient interest to insure in his own name the life of a person who granted an annuity to his testator, and which the testator bequeathed to persons not parties to the insurance (*f*). An executor *de son tort* also possesses such an interest (*g*). An executor or ad-

(*y*) *Heckman* v. *Isaac*, 6 L. T. N. S. 383.

(*z*) *Anderson* v. *Morice*, 46 L. J. C. P. 11, 35 L. T. N. S. 566, 25 W. R. 14, per Hatherly, L. C., 1 App. Cas. 742.

(*a*) *Collett* v. *Morrison*, 9 Hare 162, 21 L. J. Ch. 878.

(*b*) Lewin Law of Trusts, 7th ed. 95. *Yqung* v. *Union Ins. Co.*, 24 Fed. Rep. (U. S.) 279.

(*c*) Lewin, 506. Ex parte *Andrews*, 2 Rose 412, 1 Madd. 573. *Fry* v. *Fry*, 27 Beav. 146 44 & 45 Vict. c. 41, s. 42, sub secs. 2 and 3.

(*d*) Ex parte *Andrews*. 1 Madd. 573, 2 Rose 410. *Sidaways* v. *Todd*, 2 Stark. 400. *Armitage* v. *Winterbottom*, 1 M. & G 130. *Holland* v *Smith*, 6 Esp. 11.

(*e*) *Croft* v. *Lindsay*, Freem. Ch. 1. *Bailey* v. *Gould*, 4 Y. & C. Ex. 221. Ex parte *Andrews*, 2 Rose, 410, 1 Madd. 573.

(*f*) *Tidswell* v *Angerstein*, Peake, 204.

(*g*) *Marks* v. *Hamilton*, 7 Ex. 323, 21 L. J. Ex. 109, 16 Jur. 151, 18 L. T. 260. *Lingley* v. *Queen*, 1 Han. (New Bruns.) 280.

ministrator is not under any obligation to insure, nor personally liable if he fails to do so (*h*), unless he is under express directions. And where a testator as lessee was bound to insure, but allowed the insurance to expire and then died, the executors did not renew the insurance, and the house was burnt down whilst uninsured, the executors were not held liable for not keeping up the insurance (*i*).

Mortgagor.—A mortgagor who has conveyed away any legal
[*68] estate, *whether he be in possession or not, has an insurable interest until foreclosure absolute (*k*).

So also if he has executed an absolute transfer of the property, if it has also been agreed with the transferee that such transfer is only by way of charge (*l*).

Nor does it seem to matter whether such conveyance be by way of suretyship or for a principal debt (*m*).

Mortgagor can recover full value.—Where an insurance is made by a mortgagor on premises on his own account, notwithstanding any mortgage or other incumbrance on the premises, he will be entitled to recover the whole amount of his loss, not exceeding the insurance, since the whole loss is his own, and he remains personally liable to the mortgagee or other incumbrancer for the full amount of the debt or incumbrance (*n*).

Assignment to mortgagee of mortgagor's policy, when consented to by company if such consent be needed, is merely an equitable transfer so as to enable a mortgagee to recover in case of loss (*n*). And after loss the mortgagee can re-assign without any consent (*o*).

Judgment creditor's interest in debtor's and bankrupt's property.—A judgment creditor has in some of the United States, in virtue of his judgment, an insurable interest in his debtor's property; but he cannot recover from the insurer any injury thereto as for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be sat-
[*69] isfied (*p*). And a creditor has in that country been also *held to have an insurable interest in the insurable portion of a bankrupt's assets (*p*).

(*h*) *Croft* v. *Lindsay*, Freem. Ch. 1. *Bailey* v. *Gould*, 4 Y. & C. Ex. 221. Ex parte *Andrews*, 2 Rose 410, 1 Madd. 573.

(*i*) *Tidswell* v. *Angerstein*, Peake 204.

(*k*) *Parker* v. *Equitable*, 4 All. (New Bruns.) 562. *Kelly* v. *Phœnix*, 2 Han. (New Bruns.) 266. See *Marts* v. *Cumberland Co.*, 44 New Jersey Law 478, and *Richland County Co.* v. *Sampson*, 38 Ohio St. 672.

(*l*) *Ward* v. *Beck*, 13 C. B. N. S. 673-4. And *Gardner* v. *Cazenove*, 1 H. & N. 423, which discusses the effect of such conveyance.

(*m*) *Smith* v. *Royal*, 27 U. C. (Q. B.) 54

(*n*) *Carpenter* v. *Providence Washington*, 16 Peters (U. S.) 495, 501, per Story, J.

(*o*) *De Launay v. Northern*, 2 N. Z. (Sup. Ct.) 1.

(*p*) *Spare v. Home Mutual Insurance Co.*, 8 Sawyer (U. S. C. Ct.) 618.

(*p*) *Rohrback* v. *Germania Co.*, 62 N. Y. 47; but see *contrà*, *Malcher* v. *King William's Town Co.*, 3 Buchanan Cape (East. Distr. Rep.) 271.

Pledgee. Pawnbroker.—A pawnbroker or other pledgee has an insurable interest in the property pledged to the amount of his loan; and as a pawnbroker is by statute made liable for loss by fire of pawned property, he is allowed to insure the full value thereof (*q*).

Promise not to require payment of debt.—A promise by a creditor to a debtor without consideration not to require payment of his debt during his life, does not give the debtor an insurable interest in the life of the creditor (*r*).

Creditor.—A creditor has an insurable interest both in the life of his debtor and of any surety for the debt.

A surety has an insurable interest in the life of his co-surety to the extent of his proportion of the debt, and also in the life of the principal debtor (*s*).

A partner has an insurable interest in respect of capital contracted to be brought in by co-partner (*t*).

Extent of creditor's interest.—The limit of the creditor's insurable interest is the amount of the debt at the time when the policy is granted (*u*).

Debt must be lawful. Debt of Minor.—The debt must, however, be one which the law recognizes; therefore a sum won at gambling would not be sufficient. But a note given for a debt incurred during minority gives an insurable interest (*x*).

**Paid since policy.*—Although the debt may have been paid [*70] since the date of the insurance, the policy-money is still recoverable (*y*), (*).

Statute-barred.—The creditor's right to the policy-money is not affected by the debt becoming statute-barred before the life drops (*z*).

Fully secured.—It would seem that a secured creditor, whose security appears to be ample, has nevertheless an insurable interest in his debtor's life; for Lord Kenyon said (*a*), "A creditor has certainly an interest in the life of his debtor, because the means by

(*q*) 35 & 36 Vict. c. 93, s. 27.

(*r*) *Hebdon* v. *West*, 32 L. J. Q. B. 85, 7 L. T. N. S. 854, 8 B. & S. 579, 11 W. R. 423, 9 Jur. N. S. 747.

(*s*) *Von Lindenau* v. *Desborough*, 3 C. & P. 353, 8 B. & C. 586. *Branford* v. *Saunders*, 25 W. R. 650.

(*t*) *Connecticut Mutual* v. *Lucks*, 108 U. S. 498.

(*u*) *Anderson* v. *Edie*, 2 Park 915 (8th ed.). *Godsall* v. *Boldero*, 9 East 72.

(*x*) *Dwyer* v. *Edie*, 2 Park 914 (8th ed.).

(*y*) *Law* v. *London Indisputable*, 1 Kay & J. 223, 24 L. J. Ch. 196, 1 Jur. N. S. 179, 3 W. R. 155, 24 L. T. 108. *Ferguson* v. *Mass. Mut. Life*, 32 Hun. (N. Y.) 306.

(*z*) *Garner* v. *Moore*, 3 Drew 277, 24 L. J. Ch. 687. *Rawls* v. *American*, 36 Barb. (N. Y.) 357, Bliss Life Insurance, §§ 18–37.

(*a*) *Anderson* v. *Edie*, 2 Park 914 (8th ed.).

* The fact that the insurable interest in a life, which existed at the time the insurance was effected, ceased before death of the assured, is immaterial on the question of the right to the insurance money. Corson's Appeal, 113 Pa L. 438.

which he was to be satisfied might materially depend upon it, and at all events the death must in all cases in some degree lessen the security."

Policy on life of debtor's wife.—A debtor and his wife assigned a chose in action of the wife to a creditor of the husband to secure £300 owing by the husband. The creditor insured the life of the wife for £200; and although the chose in action was not reduced into possession during the life of the wife, on her death the creditor was held to have an insurable interest (*b*).

Joint-debtors.—Where A. and B. jointly execute a bond as a collateral security for the repayment of a sum of money, A. has an interest in B.'s life in respect of his liability in case of B.'s death to pay the whole of the debt. But his interest in the life is only in half the amount of the debt secured by the bond, since he was in any event liable for the other half (*c*).

Mortgage equitable lien and debt.—A morgagee has an insur-
[*71] able interest in the mortgaged *property up to the amount of the debt, whether the mortgage is legal or equitable; and it seems perfectly clear that a person having a lien or an interest in the nature of a lien on the property insured has an insurable interest, and it will make no difference in such a case that he might still have a right to pursue his debtor personally for the debt on account of which the lien attached (*d*). A debt which has no reference to the article insured, and which cannot create a lien on it, will not give an insurance interest; but a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest (*e*); and see *Davies* v. *Home Ins.*, 3 U. C. (App.) 269, where it was held that the endorser of an accommodation bill had an insurable interest in the goods for which the bill was given, if it had been agreed that he should be paid out of the proceeds of such goods. Neither actual or constructive possession of the property need be in the assured either when the policy is issued or the loss happens. It is enough to have an equitable lien on the specific property covered by the policy (*f*).

Policy good though interest may be defeated by third person.—If the interest of the assured be liable to be defeated by the act of a third person, or be voidable, the policy will not therefore be invalidated under 14 Geo. III. c. 48, s. 2 (*g*).

Insurable interest requisite in accident insurance.—Insurance against death by accident is within the statute as to interest (*h*).

(*b*) *Henson* v *Blackwell*, 4 Hare 434, 9 Jur. 390, 14 L. J. Ch. 329

(*c*) *Branford* v. *Saunders*, 25 W. R. 650.

(*d*) *Hancox* v. *Fishing Insurance Co.*, 3 Summer 139, per Story, J., and see *Clarke* v. *Scottish Imperial*, 4 Canada (S. C.) 192.

(*e*) *Wolff* v. *Horncastle*, 1 B. & P. 323, per Buller, J.

(*f*) Per Henry J., in *Clarke* v. *Scottish Imperial*, 4 Canada (S. C.) 213.

(*g*) *Hill* v. *Secretan*, 1 Bos. & P. 315. *Lindenau* v. *Desborough*, 8 B. & C. 586, 3 C. & P. 353. *Clay* v. *Harrison*, 10 B. & C. 99. *Dwyer v. Edie*, 2 Park 914.

(*h*) *Shilling* v. *Accidental Death Insurance Co.*, 1 F. & F. 116, 2 H. & N. 42, 26 L. J. Ex. 266, 27 L. J. Ex. 16, 29 L. T. 98, 5 W. R. 567.

Name of person interested must appear.—The statute (s. 2) [*72] requires the name of the person for *whose use or benefit, or on whose account the policy is effected, to be inserted therein (*i*). Therefore where a husband obtained a loan from his wife's trustees upon his obtaining a surety for its repayment, and the surety stipulated that the husband should insure his wife's life, the husband having induced his wife to insure her own life in her own name without reference to its being for her husband, the policy was held void (*k*).

Fire insurance by one partner in firm's name, policy belongs to firm.—It has been held in one American State that where insurance against loss by fire is effected by a member of a firm in the firm's name upon property of the firm, and the premium therefor is paid from funds of the firm though charged by such member to himself, the insurance will be for the benefit of the firm, notwithstanding that the partner thus effecting it intends it for his own private benefit (*l*).

It is immaterial whether the contract in relation to which the insurable interest arises is or is not under seal or in writing, or whether it is merely verbal, so far as the rights of the parties are concerned. This circumstance only varies the mode of proof without altering the principle on which the rights of the parties depend (*m*).

Absence of insurable interest only defence to insurer.—If a policy in the name and on the life of another be effected for his own benefit by a person who has no insurable interest in such life, and the insurance company, on the death of the person whose life is insured, pays the insurance-money to the person effecting the insurance, he is entitled to retain the money as against *the legal [*73] personal representative of the deceased;[4] and although the illegality of the policy under 14 Geo. III. c. 48, on the ground of absence of insurable interest would have constituted a good defence to an action against the insurance company at the suit of the person effecting the insurance, yet, the money having been paid to him, such illegality would affect his right to retain it; for the statute is a defence for the insurance company only if they choose to avail themselves of it (*n*).

(*i*) *Hodson* v. *Observer, &c., Co*, 8 E. & B. 40, 3 Jur. N. S. 1125, 26 L. J. Q. B 303, 29 L. T. 278, 5 W. R. 712

(*k*) *Evans* v *Bignold*. 20 L. T. N S. 659, L. R. 4 Q. B. 622, 38 L. J. N. S. Q. B. 293, 10 B. & S. 621, 17 W. R. 882.

(*l*) *Tebbitts* v. *Dearborn*, 74 Maine 392 (1883).

(*m*) *Miller* v. *Ware*, 1 C & P. 239, per Park, J. *Patrick* v. *Eames*, 3 Camp. 442, per Ellenborough, C. J

(*n*) *Worthington* v. *Curtis*, 1 Ch. D. 419 45 L J N S Ch. 259, 33 L T. N. S 828, 24 W. R. 228. See also *Troop* v. *Anchor Co*, 8 Russ. & Gel. (Nov Sco) 234.

[4] If A, who is neither B's relative nor creditor, insures B's life, and to reimburse himself for outlays to be made under a contract to support B for life, he can only recover from insurance money enough to cover expenses. The rest belongs to B's estate. *Seigrist* v *Schmoltz*, 113 Pa. St 326

Agent must pursue his authority.—Where the defendant authorized two of his creditors to effect a policy of insurance on his life for a certain time in their own names as a security for their debt, the policy to be assigned to him when the demand was discharged, and they effected the insurance in their own names and that of a third person who subsequently became their partner, it was held that the authority given by defendant was not pursued, and that an action for the recovery of the premiums could not be maintained (*o*).

(*o*) *Baron* v. *Fitzgerald*, 9 L. J. N. S. C. P. 153, 6 Bing. N. C. 201.

*CHAPTER III. [*74]

THE PREMIUM.

Premium, nature of.—The premium[1] is the price for which the insurer undertakes his liabilities. It may be a consideration other than money payment; *e. g.*, in a mutual insurance it may consist of a liability to contribute to the losses of other members of the mutual society (*a*). The members in such a society being both insured and insurers, offer as a premium their liability aforesaid, and as insurers receive as premium the right to have their own loss paid whenever it happens.

Must be agreed.—In *Lucena* v. *Crawford* (*b*) the premium is defined by Lawrence J., as "a price paid adequate to the risk," but the adequacy of the premium is purely the insurer's concern. He cannot dispute the validity of the contract merely because the premium is inadequate; for as it is the price for which he upon his own calculations agrees to take the risk, his own agreement is conclusive against him. The insurer's satisfaction with the premium is a condition precedent to the formation of the contract (Malyns 112). In the old policies the words "I am content with this assurance" were inserted as an acknowledgment that the insurer was satisfied with and would not later dispute the sufficiency of the premium. The only point which the assured need consider with regard to the sufficiency of the premium, is whether it is sufficiently proportionate to the risks intended to be run to enable the insurer to meet the average losses of his business. But such a consideration *in any case is merely secondary, as his [*75] action is most likely to be guided by his knowledge or belief as to the general solvency of his insurer rather than the special risk undertaken.

Premium need not be prepaid.—Prepayment of the premium is not in law a condition precedent to the making of a complete contract of insurance (*c*). But it is the almost universal practice of insurers other than marine to stipulate that the contract shall not begin

(*a*) *Lyon Mutual Marine* v. *Tucker*, 12 Q. B. D. 176, 187, 49 L. T. N. S. 764

(*b*) 2 N. R 301. 1 Taunt, 325.

(*c*) *Dayton Insurance Co.* v. *Kelly*, 24 Ohio St. 345 18 Am. Rep. 612. *Kelly* v. *London and Staffordshire*, 1 Cababé & Ellis 47.

[1] The word premium comes either from the word *præmium*, signifying price, or from the word *primò*, because formerly the premium was paid before all, and at the time of signing the policy. Hence it is called *primeur*, *prémie*, *coust*, or *agio d'assurance*. *Emerigon*, chap. 3, sec. 1.

to take effect until the premium has been paid, and the Courts in presence of such a stipulation will not (unless the premium has been paid) give effect to the contract where a loss has happened after an agreement to issue and accept a policy, but before the policy has been issued, or even when it has been delivered as an escrow (*d*).

Non-payment. Waiver.—But when it is a condition in the policy that the policy shall not be binding until the premium is paid the Court will readily infer a waiver of such condition (*e*).[2]

Forfeiture.—Since the Courts will not favour a forfeiture (and this applies as much to forfeitures under conditions in policies as to those under covenants in leases), it has been held in America that a forfeiture under a life policy for non-payment of premium must be claimed before the death of the assured, at which date the liability accrues, and can no longer be denied (*f*).[3]

It does not, however, seem necessary in that case to go so far. The doctrine of estoppel rather than waiver applies to cases [*76] where the insurer discovers a forfeiture, *and lies by until the happening of the loss. But insurers by their acts may estop themselves from setting up forfeiture (*g*).

If a policy containing a condition that it shall not be binding until the premium is paid, and also an acknowledgment of the receipt of the premium is delivered to the assured before payment of the premium, this raises a presumption of waiver of such condition, and of an intention to give credit for the premium, the condition notwithstanding (*h*).

Policy not binding till premium paid. Waiver of the condition.—A policy stipulated that it should not be binding until the actual payment of the premium, and the Court held that it was competent for insurers to waive the condition, and that such waiver might be established by evidence of an express agreement to that effect or by

(*d*) *Flint* v. *Ohio, &c., Co.*, 8 Ohio 501. *Bodine* v. *Home Co.*, 51 N. Y. 117. See *Canning* v. *Farquhar*, 16 Q. B. D. 727, 55 L. J. Q. B. 225, 34 W. R. 428.

(*e*) *Supple* v *Cann*, 9 Ir. C. L. 1, Sansum 910 *et seq.*

(*f*) See *Young* v. *Mutual Life Co.*, 2 Sawyer (C. Ct. U. S.) 325.

(*g*) See *Scottish Equitable* v. *Buist*, 4 C. S. C. (4th series) 1076. *Wing* v. *Harvey*, 5 De G. M. & G. 265, 23 L. J. Ch. 511, 23 L. T. 120, 18 Jur. 394, 2 W. R. 370. *Appleton* v. *Phœnix*, 47 Am. Rep 220.

(*h*) *Massé* v. *Hochelaga Co.*, 22 Lr. Can Jur. 124. *Basch* v. *Humboldt Mutual*, 35 New Jersey 429, 3 Kent Comm 260. *Anderson* v. *Thornton*, 8 Ex. 425. *Von Wein* v. *Scottish, &c., Co.*, 52 N. Y. (Sup. Ct.) 490.

[2] A condition in a policy exempting company from liability, until actual payment of premium, may be waived. *Universal F. Ins. Co.* v *Block*, 109 Pa Stat. 535. *Elkens* v. *Susquehanna Mutual F. Ins. Co.*, 113 Pa. St. 386. *Alabama Gold Life Ins. Co.* v. *Garmany*, 74 Ga. 51.

[3] Life policy in mutual company is not to be deemed forfeited for non-payment of interest or premium notes, where contract does not so provide, where there would be no forfeiture for non-payment of the principal, and where company has funds of assured sufficient for the interest. *Northwestern Mut. Life Ins. Co.* v. *Fort*, 82 Ky. 269.

circumstances,[4] and that delivering a policy confessing the payment of premium was evidence of the waiver (*i*).

Credit for premium.—In any case where credit is intended to be given for premiums, and is actually given, non-payment thereof will not avoid the policy;[5] and is no defence to an action on the policy, but merely matter of set-off (*k*). Even though the assured has been enjoined in Chancery to pay the premiums, and has not done so, it is no defence to the insurer (*l*).

Receipt in policy.—Where the policy admitted payment, parol evidence that payment had not actually been made was held inadmissible (*m*).

*In the United States of America, where a note at sixty [*77] days was accepted for the premium, payment of which was admitted in the policy, the policy did not become void on non-payment of the note, although the policy contained a condition that where a note was taken for the premium it should be considered a cash payment, provided it was paid when due (*m*).

Credit for premiums.—When a premium is paid by bill of exchange or promissory note, the liability of the insurer lasts until the maturity of the note and even thereafter, unless it be stipulated that it shall terminate if the note is dishonoured (*n*). For the acceptance of a note is a form of giving credit. And the Supreme Court of the United States has held that, to insure a forfeiture, the bill must be protested and proceeded on (*o*).

Waiver by acceptance of premium.—Acceptance of premiums falling due after breach of condition or discovery thereof, evinces an election to continue the policy as valid, if the existence of the breach be known (*p*). So if the premium be accepted by an agent, and remitted with information of the breach, the insurers must return it at once or they will, it seems, be liable (*q*).[6]

(*i*) *Goit* v. *National Protection*, 25 Barb. (N. Y.) 189.

(*k*) *Millar* v. *Life, &c., Co.*, 12 Wal. (U. S.) 285, 301.

(*l*) *Hodgson* v. *Marine*, 5 Cranch (U. S.) 100.

(*m*) *Anderson* v. *Thornton*, 8 Ex. 425. *Dalzell* v. *Mair*, 1 Camp. 532. *De Garminde* v. *Pigou*, 4 Taunt 246.

(*m*) *Illinois Central, &c., Co.* v. *Woolf*, 37 Illinois 354. See also *Compagnie d' Assurance* v. *Grammon*, 24 Lr. Can. Jur. 82.

(*n*) *Hopkins* v. *Hawkeye Insurance Co*, 57 Iowa 203. *Kelly* v. *London and Staffordshire Co.*, 1 Cab & Ellis 47.

(*o*) *Knickerbocker Co.* v. *Pendleton*, 112 U. S. 696 (Davis Rep.).

(*p*) *Armstrong* v. *Turquand*, 9 Ir C L. 32, 55.

(*q*) *British Industry Co.* v. *Ward*, 17 C. B. 645-649.

[4] Life insurance company issued pamphlet containing statement that thirty days grace allowed on payment of premiums. Held, that, notwithstanding condition, the policy could not be forfeited when premium tendered was overdue, the statement in pamphlet being relied upon. *Fowler* v. *Metropolitan L. Ins. Co.*, 41 Hun. (N. Y.) 357.

[5] A custom to give short credits for premiums due may be construed as a waiver of the right to insist on a forfeiture. *Lebanon Mut Ins Co.* v. *Hoover*, 113 Pa. St. 591. *Tennant* v. *Traveller's Ins. Co*, 31 Fed Rep. 322.

[6] Acceptance of premium, after default, operates as a waiver of the condition *Smith* vs. *St. Paul F. &c. Ins. Co.*, 3 Dak. 80.

Waiver of forfeiture by non-payment.—An insurance company granted a loan upon a bond with sureties, and a policy on the life of the borrower as collateral security. The premiums not being paid within the days of grace, the insurers demanded them, and commenced actions for them against the sureties (*r*). This would have amounted to a wavier of the forfeiture, but as the sureties refused to pay the premiums, V.-C. Shadwell held that they thereby neutralized the effect of this waiver.

[*78] **Waiver of right to forfeit policy.*—If the insurer receive notice from whatever source that the risks insured against have been misrepresented, concealed or incompletely disclosed, or increased or varied, and accepts further premiums on the same policy at the rate originally agreed, in such case his right to avoid the contract is waived, and he cannot subsequently have it avoided even on tender of such premiums (*s*).

Company bound by agent's receipt of premium. Agent received premium knowing assured was abroad and policy not forfeited.—Where a life policy was subject to a condition avoiding it if the assured went out of Europe without licence, and an assignee of the policy paid the premiums to a local agent of the company and informed him that the assured was in Canada, the agent stated that this would not avoid the policy, and received the premiums until the death of the assured; and the Court held that the company were thus precluded from treating the policy as forfeited (*t*).

Payment to agent after forfeiture.—Where a man is the agent of an insurance company to receive premiums on subsisting policies, receipt by him of premiums on policies as to which there had been breach of condition, such payments being made in belief that the policies were good and subsisting, will, it seems, bind the company (*u*).

A fortiori, if the directors receive the premiums through such agent, or indeed any agent, with knowledge or notice of the breach, they are estopped from saying that they received the premiums otherwise than for the purpose and in the faith for which, and in which, they were paid (*x*).

But if an agent has no authority to contract for the company, receipt by him of an overdue premium will not be waiver by [*79] the company of a forfeiture. Nor will *the debiting of the premium by the company to the agent amount to such wavier (*y*). If the agent fails to return the policy as lapsed within the time directed by his instructions, it is doubtful whether this

(*r*) *Edge* v. *Duke*, 18 L. J. Ch 183

(*s*) *Scottish Equitable* v. *Buist*, 4 C. S. C. (4th series) 1076.

(*t*) *Wing* v. *Harvey*, 5 De G. M. & G. 265, 23 L. J. Ch. 511, 18 Jur. 39, 23 L. T. 120, 2 W. R. 370.

(*u*) Same case.

(*x*) *Ibid.* Regarding renewal receipt with condition as to receipt from head office, *vide Moore* v. *Halfey*, 9 Victoria L. R. 400.

(*y*) *Acey* v. *Fernie*, 7 M. & W. 151, 10 L. J. Ex. 9.

would help the assured, unless the power to give credit for premiums is within the scope of the agent's mandate.

Condition—waiver—agent.—It is of course a mere question of fact whether or not the agent has such authority; and if the authority is denied, the plaintiff must prove it, or set up facts from which it may fully be inferred (*z*).

Overdue premiums, when acceptance no waiver.—Payment of overdue premiums after the death of the assured will not save the policy, whether payment be made by the assessors of the assured (*a*) or the beneficial owner of the policy; and acceptance by the company in ignorance of the death, which ignorance is shared by the person offering payment, will not save the policy (*b*).

For overdue premium cheque given. Payment not got before death.—An extreme case has lately arisen in Canada. The assured could not pay a premium, but gave his cheque on the understanding that it should not be presented till there were funds to meet it. It was several times presented and dishonoured, but at last funds sufficient were lodged in the bank, and notice thereof given to the insurer shortly before the bank's hour for closing. The insurer's agent waited till next morning, and the assured was killed during the evening. The Court of Queen's Bench held by a majority that payment was not made in time (*c*)—(1) Because the cheque did not operate as payment, but only as a means thereto; (2) That by the death before actual payment mutuality *between the [* 80] parties became impossible, and the health certificate could not be given.

Renewal premium. Condition as to good health.—The stipulation contained in most life policies that overdue premiums will only be received if the assured is in good health at the time of tendering them, is merely to guard against frauds being committed upon the insurer, not to prevent him from dealing with the insured in full knowledge of the facts as to his health which he and his friends possessed. So where the assured had received what turned out to be his death-wound, but at the time neither he nor his doctor had any apprehension that it would be fatal, and paid an overdue premium, the payment in Canada was held good and the forfeiture completely waived (*d*).

If no risk, premium returnable.—In *Tyrie* v. *Fletcher* (*e*) Lord Mansfield said: "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured

(*z*) *British Industry Co* v. *Ward*, 17 C. B. 644, 649. But see *Montreal* v. *M'Gillivray*, 13 Moore P. C. 89.

(*a*) *Simpson* v. *Accidental Death*, 2 C. B. N. S. 257, 26 L. J. C. P. 289, 30 L. T. 31, 3 Jur. N S 1079, 5 W. R. 807. *Want* v. *Blunt*, 12 East 183.

(*b*) *Pritchard* v. *Merchants', &c., Co*, 3 C. B. N. S. 622, 27 L. J. C. P. 169, 30 L. T. 318, 6 W. R. 340, 4 Jur. N. S. 307.

(*c*) *Neill* v. *Union Mutual Life*, 45 U. C. (Q. B.) 593. Affd. 7 Ontario (App.) 171.

(*d*) *Campbell* v. *National Insurance Co.*, 24 U. C. (C. P.) 133.

(*e*) 2 Cowp. 668, 689. *Want* v. *Blunt*, 12 East 183.

or to any other cause, the premium shall be returned. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it. *If risk begins, premium not returnable.*—Another rule is, that if the risk has once commenced there shall be no apportionment or return of premium afterwards. There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and that is an insurance upon a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it. For the underwriter would demand double the premium for two years that he would take to insure the same life for one year only. In such policies there is a general exception against suicide. If the [*81] person puts *an end to his own life the next day, or month afterwards, or at any other period within the twelve months, there never was any idea in any man's breast that part of the premium should be returned." And in the same case, Aston, J., thus expressed himself: "The sum payable and the time were both *lumped.*"

No risk no premium.—The premium, if paid before the risk begins, can be recovered if the risk insured against is not run, whether the cause of its not being run is the fault, will, or pleasure of the insured (*f*). For the risk is the consideration for which the premium is to be paid. If it is not run consideration fails, and it is inequitable that the insurer should receive and retain the price of running a risk when in fact he runs none (*g*).

The same principle is also expressed when it is said that payment of premium before risk run is payment *sub conditione*, or deposit of money with the insurer to answer a certain event, and that the money paid may be recovered back (if the condition is not satisfied or the event does not happen) as money received to the use of the assured (*h*).

Where the *interest* insured turns out to be less than the amount insured, there shall be a return of the overplus premium. This is a custom co-eval with the contract of insurance itself, but applies only where the over-insurance is made in good faith.

Return of premium where several policies.—Where several policies have been effected in good faith before the risk begins on the same subject-matter, and their total amount exceeds the value of the interest of the assured in the whole subject-matter, there must be a return of premium rateably on all the policies, calculated in [*82] such a way as to reduce the *premium on each policy to that,

(*f*) *Stevenson* v. *Snow*, 3 Burr. 1237, 1 Wm. Bl. 315. *Tyrie* v. *Fletcher*, 2 Cowp 668. *Routh* v. *Thompson*, 11 East 428, 13 East 428. *Bermon* v *Woodbridge*, 2 Doug. 781. *Stone* v. *Marine Co.* 1 Ex. D. 81, 45 L. J. Ex. 361, 34 L. T. N. S 490, 24 W. R. 554.

(*g*) 2 Park 768 (8th ed.).

(*h*) *Martin* v. *Sitwell*, 1 Shower 151. *Simond* v. *Boydell*, 1 Doug. 268.

proper to the amount actually in the result insured by or payable under that policy (*i*).

This is a further consequence of the principle that if the property insured never comes within the terms of the written contract, the insurer never has any risk (*k*).

It does not matter whether the insurance was made in expectation of an interest or in over-estimation of the value thereof. The application of the contract is limited to the amount really at risk, and if the premium is paid upon any greater amount, or any other risk, it is not paid for what is within the contract.

Insurers of the same interest in the property, moreover, all rank together, since they all contract to indemnify in respect of the same interest in the assured; and, as they are bound to contribute proportionally in case of loss, they ought also to return the premiums proportionally where no risk attaches, or a less risk than that contemplated (*l*).

Where the insurance is in expectation of interest, and it turns out that the assured in the end had no interest at all, the policy never attached, and the premium is repayable (*m*).

No interest return of premium.—When the policy is void *ab initio*, without any fault in the assured, and has never attached, the premium is returnable, since the insurer has never been under any liability (*n*).

These questions arise rarely in fire and life insurance, *since, [* 83] as a rule, the interest in such cases is certainly known to the assured, and if he over-insures there is suspicion of bad faith.

But a house may be insured in the mistaken belief that it is standing, when in fact it has already been burnt down, and a life may be insured in belief that the *cestui que vie* is still living when he is in fact dead (*o*)—in both of which cases the premium must be returned.

If risk run, premium can't be recovered.—As a general rule the right to the premium is indefeasible when the policy attaches (*p*). And when the risk insured against has once begun, the premium cannot be recovered back by the assured (*q*).

The risk may attach only in part or only to some separable part of the subject-matter. In such cases the risk is divisible and the whole risk is not run. That portion of the premium which is apportionable to that part of the subject-matter to which no risk has

(*i*) *Fisk* v. *Masterman*, 8 M. & W. 165.
(*k*) *Henkle* v. *Royal Exchange*, 1 Ves Sen. 309.
(*l*) *Godin* v. *London Assurance*, 1 Burr. 490. See also *Fisk* v. *Masterman*, 8 M. & W. 165.
(*m*) *Routh* v. *Thompson*, 11 East 428.
(*n*) *Furtado* v. *Rogers*, 3 B. & P 191. *Oom* v. *Bruce*, 12 East 226.
(*o*) *Stone* v *Marine, &c., Co*, 1 Ex. D. 81, 45 L. J. Ex. 361, 34 L. T. N. S. 490, 24 W. R. 554. See per Amphlett B.
(*p*) *Moses* v. *Pratt*, 4 Camp. 297.
(*q*) *Lowry* v. *Bourdieu*, 2 Doug. 468. *Tyrie* v. *Fletcher*, Cowp. 668. *Stone* v. *Marine, &c., Co*, *ubi supra*.

attached is recoverable (*r*). But if the whole contract is one and entire, and the risk has once commenced, there will be no return of premium (*s*).

As regards life insurance, it was early laid down that where a policy was granted containing the common exceptions of suicide and death by the hands of justice, if the party commits suicide, or is executed within twenty-four hours of the granting of the policy, there shall be no return of premium, on the principle that, although the death was caused by an excepted risk, the policy was operative so far as regarded the risks covered by it (*t*).

[*84] *Insurers not infrequently stipulate for a power to terminate the risk at any time during its currency, upon notice and repayment of a proportion of the premium. This option is probably taken to enable them to write off risks when the course of their business during a particular year renders it prudent to do so, or to enable them to get rid of a liability where, after insurance, they find grounds for suspicion.

In time policies no apportionment of premium or risk is usually allowed (*x*).

This rule would apply *consimili casu* to insurance other than marine; but such contingencies, though conceivable, are rare.

Divisible risk and premium.—Insurances against fire are usually made for an entire and connected portion of time which cannot be severed, and the premium paid as a price for taking the risk as a whole. The doctrine, therefore, as to divisible contracts rarely if at all applies to fire insurance (*y*). But voyage policies can be made against fire for land journeys, and insurances made against fire within a certain locality on special goods (*z*). And if fire by a cause not insured against occurred on the day after the policy began to run, the assured could neither recover his premium nor a proportionate part thereof (*a*). And if goods or house insured against fire are assigned, the premium for the period of unexpired risk cannot be recovered, nor the benefit of the policy passed (*b*). The fire offices, however, usually do equity by recognizing the assignee by

[*85] indorsement on the policy or entry in the insurers' *books. But they cannot be compelled to do so by agreement between the parties (*c*).

The risk on life is divisible to a certain extent. The risk in cer-

(*r*) *Stevenson* v. *Snow*, 3 Burr. 1288, 1 Wm. Bl. 315.
(*s*) *Bermon* v. *Woodbridge*, 2 Doug. 781.
(*t*) *Ibid.* 788.
(*x*) *Loraine* v. *Thomlinson*, 2 Doug. 585.
(*y*) Ellis Ins. 24. *Woodward* v. *Republic Fire Co.*, 32 Hun. 365.
(*z*) *Pearson* v. *Commercial*, 1 App. Cas. 498, 45 L. J. C. P. 761, 33 L. T. N. S. 445, 24 W. R. 951.
(*a*) *Tyrie* v. *Fletcher*, 2 Cowp. 666.
(*b*) *Sadlers* v. *Badcock*, 2 Atkyns 554, 1 Wilson 10. *Lynch* v. *Dalzell*, 4 Bro. P. C. 431.
(*c*) *Bank of New South Wales* v. *North British and Mercantile*, 3 N. S. W. Law 60.

tain latitudes varies from that in others for certain races and constitutions. If a policy is made with licence to go into a region of greater risk with a premium proportioned to the greater risk, if the man does not go he can get back his extra premium, and he is not in the least obliged to go by getting the licence.

Whether insurance yearly or quarterly.—If premiums are payable yearly, the insurance is from year to year; if they are paid half-yearly or quarterly, the insurance is from half-year to half-year or quarter to quarter.

Illegal insurance. Recovery of premium.—If an illegal insurance be effected, the parties being *in pari delicto*, the assured cannot in the event of loss recover the insurance money, nor can he recover back the premiums he has paid (*d*). If the risk has been run and no loss occurred, the assured cannot recover back his premiums (*e*). In both these cases the contract of insurance would be executed and the maxim apply, "In pari delicto potior est conditio possidentis."

If, however, the risk has not been run and the contract continues executory, the assured may, notwithstanding the illegality of the contract, obtain a return of the premiums (*f*). The assured should, however, in this latter case give notice to the insurers of his intention to abandon the contract (*g*).

**Return of premium when policy illegal.*—If the insurance is [*86] legal when made, but becomes illegal by the effect of a subsequent law, both parties to the contract are discharged and the premium is returnable (*h*).

If both parties contemplate and intend to enter into a legal contract, but mistakenly enter into a contract which is illegal, the insured can recover back the premium (*i*).

If the contract is illegal in consequence of facts not known to the parties at the time of its making, the premium is recoverable. Ignorance of fact is no fault (*k*).

Non-return of premiums paid under invalid policy. But company bound to grant valid policy.—Where a policy is invalid for non-compliance with the terms of a statute regulating the mode of making it, it was held in Canada that the insured could not get back his premiums if he paid with knowledge of the invalidity (*l*). But the company were held bound to give him a proper policy, and in a

(*d*) *Allkins* v. *Jupe*, 2 C. P. D. 375, 46 L. J. C. P. 824, 36 L. T. N. S. 851. *Cope* v. *Rowlands*, 2 M. & W. 149, 157. *Andree* v *Fletcher*, 3 T. R. 266.

(*e*) *Lowry* v. *Bourdieu*, 2 Doug. 468. *Patterson* v. *Powell*, 2 L. J. C P. 13, 68, 9 Bing. 326, 620, 2 Mo. & Sc. 399, 773. See also *Herman* v. *Jeuchner*, 15 Q. B. D. 561.

(*f*) *Lowry* v. *Bourdieu*, *ubi supra*.

(*g*) *Pulyart* v. *Leckie*, 6 M. & S 290.

(*h*) *Gray* v. *Sims* (Am), 3 Wash. C. C. 276.

(*i*) *Hentig* v. *Staniforth*, 5 Mau. & S. 122, 1 Stark, N. P. 254.

(*k*) *Oom* v. *Bruce*, 12 East 2 5

(*l*) *Perry* v. *Newcastle District Mutual Fire Co.*, 8 U. C. (Q. B.) 363. *Wright* v. *Sun Mutual*, 29 U. C. (C. P.) 221.

later case the Supreme Court of Canada has held it a fraud to set up the want of a seal as an answer to an action on a policy where the insurers were by their constitution only permitted to contract under seal (*m*).

Premium returnable.—Where the name of the person interested in a policy is omitted or not inserted as that of the person interested (*n*), or as a trustee for him or her (*o*), the would-be assured is entitled to a return of premiums paid by him (*p*) if there is no fraud in such a case (*q*), as the policy never attaches.

[*87] **Recovery of premiums by creditor over-insuring.*—In Lower Canada a creditor, who in good faith over-insured his debtor's life, was held entitled to a return of premiums as to the excess, there having been no intention to defraud, but only a mistake as to law (*r*).

Effect of fraud on return of premiums.—Premiums paid on an assurance obtained by actual fraud on the part of the assured or his agent cannot be recovered back. The insurer thus gains one or more premiums by an unsuccessful attempt to defraud him, and the assured is to that extent fined for his fraud; but to let the insured recover his premium would allow him to allege his own wrong as a ground of relief (*s*).

Altering the policy by adding words which would materially change its effect will amount to fraud and have the same result (*t*). Equity, however, will only decree the delivery up of a fraudulent and therefore void policy, when the insurer, seeking relief, offers either to repay the premiums paid, or to submit to any terms which the Court may think fit to impose in granting such relief, which will include the repayment of premiums. To hold otherwise would be to let the insurer affirm and deny the contract in one breath (*u*). And this rule is applied even in cases of gross fraud or crime on the part of the assured; thus in *Prince of Wales* v. *Palmer* the assured effected a policy in his brother's name and on his brother's life, and was declared by a coroner's jury to have poisoned his brother. Under these circumstances the policy was, at the suit of the insurers,

[*88] of course declared void; but the insurers were *not allowed to retain the premiums, which were ordered to be applied in

(*m*) *London Life Co.* v. *Wright*, 5 Canada (S. C.) 467.

(*n*) *Hodson* v. *Observer*, 8 E. & B. 40, 26 L. J. Q. B. 303, 29 L. T. 278, 3 Jur N. S. 1125, 5 W. R. 712.

(*o*) *Collett* v. *Morrison*, 9 Hare 162, 21 L. J. Ch. 873.

(*p*) *Dowker* v. *Canada Life*, 24 U C. (Q B) 591.

(*q*) *Wainwright* v. *Bland*, 1 M. & R 481, 1 M. & W. 32, 5 L. J. N. S. Ex. 147.

(*r*) *Lapierre* v. *London and Lancashire Life Co.* (1877), 2 Stevens Quebec Dig. 399.

(*s*) *Chapman* v. *Fraser*, Park 456. *Taylor* v. *Chester*, L. R. 4 Q. B. 309.

(*t*) *Langhorn* v. *Cologan* 4 Taunt 330.

(*u*) *De Costa* v. *Scandret*, 2 P. Wms. 170, per Macclesfield, C. (1689). *Whittingham* v. *Thornborough*, 2 Vern. 206, Prec. Ch. 20. *Barker* v. *Walters*, 8 Beav. 92, 96, per Lord Langdale.

payment of the costs of all parties, and the residue paid into Court with liberty to apply (*x*).

Policy cancelled. Return of premium.—On the same principle, in the case of a policy of life insurance which had been obtained by fraud, the first underwriter being simply a decoy duck to induce other persons to sign, the policy was set aside at the suit of the insurer, with costs, and the premium received on the policy was directed to go in part payment of the costs (*y*); and where a merchant, having heard that his ship was in danger, insured her without disclosing to the insurers what intelligence he had received, Lord Macclesfield held that the concealing of this intelligence was a fraud, and decreed the policy to be delivered up with costs, but the premium to be paid back, and allowed out of the costs (*z*).

Return of premium where misrepresentation.—Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the premium. The policy is itself conclusive evidence that the insurers have received the premium (*a*).

Form of order.—The form of an order setting aside a void contract of insurance, the insurers returning the premiums, is as follows:—"The plaintiffs (the company) being willing, and hereby offering to return the premiums, declare that the acceptance by the plaintiffs of the defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled" (*b*).

**Fraud of insurer. Return of premium.*—A premium paid on [* 89] an insurance obtained by fraud on the part of the insurer may be recovered by the assured (*c*). In *Carter* v. *Boehm*, Lord Mansfield well observes that the principle on which this rule rests governs all contracts and dealings. "Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary."

Parties not in pari delicto.—So also the premium is recoverable when the contract is illegal and the insurer is more in the wrong than the assured, the parties not being *in pari delicto* (*d*).

Premiums forfeited where so agreed.—The insurers may and usually do stipulate as one of the terms on which they will insure, that in certain events (*e. g.*, in case of any untrue statement by the assured)

(*x*) *Prince of Wales Co.* v. *Palmer*, 25 Beav. 605.
(*y*) *Whittingham* v. *Thornborough*, 2 Vern. 206, Prec. Ch. 20.
(*z*) *De Costa* v. *Scandret* 2 P. Wms. 169. See *Duckett* v. *Williams*, 2 Cr. & M. 348, 3 L. J. N. S. Ex 141.
(*a*) *Anderson* v. *Thornton*, 8 Ex. 425. *Feise* v. *Parkinson*, 4 Taunt. 640. *New York Life* v. *Fletcher*, 10 Davis (Sup. Ct. U. S.) 519.
(*b*) *London Assurance* v. *Mansell*, 11 Ch. D. 372, 48 L. J. Ch. 331, 27 W. R. 444.
(*c*) *Carter* v. *Boehm*, 3 Burr. 1909. *Duffell* v. *Wilson*, 1 Camp. 401.
(*d*) *Lowry* v. *Bourdieu*, 2 Doug. 472, per Lord Mansfield. *Dowker* v. *Canada Life*, 24 U. C. (Q. B.) 591.

the premiums paid shall be forfeited. When the parties have thus contracted and the prescribed events happen, the premiums which the assured has paid cannot be recovered back by him even though the untrue statement shall have been made quite innocently (*e*).

Such stipulation is made by way of condition in the policy. The events usually stipulated for are "avoidance of the policy by any untrue or incorrect statement in the declaration, or breach of warranty, or condition."

Assured can't compel insurer to accept additional premiums.—Where the risk has been insufficiently disclosed, or misrepresented, or materially altered or varied during the contract, the insured has no right, either legal or equitable, in the absence of any special stipulation in the policy, to compel the insurer either to take an [* 90] enhanced premium or to return any portion of the *premium paid. Nor can he in case of a loss recover the policy-moneys on the tender of the premium usually charged by the insurer on the actual risk run. Such conduct or events entitle the insurer to enforce a forfeiture or to waive it at his own option (*f*).

Amount of premium evidence of materiality.—When questions arise as to the materiality of facts not disclosed, the amount of premium which would have been charged on a risk, including these facts, is evidence to show that knowledge of the facts would have been material or immaterial to the insurer (*g*).

It seems that if a premium be paid to the agent of an insurer in respect of a contract known, or which ought to be known, to be outside the scope of his agency, it is not recoverable from the insurer (*h*).

Excess of authority by agent return of premium.—It may be observed that if the insurer receives the premium from his agent with knowledge of the nature of the insurance effected, he ratifies such contract, except in certain cases, in which the insurers are corporations with limited powers, and such ratification is *ultra vires*. But even there profit by an *ultra vires* act is unconscientious, and the assured can maintain an action for the premiums, and if the insurance company is in liquidation may prove for the same (*i*).

If a policy be issued in fraud of the insurance company, the company would be bound to account to the assured for any benefit derived from the premiums (*k*).

[* 91] **Return of premium by agreement.*—Agreements may be made

(*e*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484, 17 Jur. 995. *Thomson* v. *Weems*, 9 App. Cas. 671, 682. *Duckett* v. *Williams*, 3 L. J. N. S. Ex. 141, 2 Cr. & M. 348.

(*f*) *Sears* v. *Agricultural*, 32 U. C. (C. P.) 585.

(*g*) Re *Universal Non-Tariff Co.*, *Forbes' claim*, 19 Eq. 485, 44 L. J. Ch. 761, 23 W. R. 464. *Ionides* v. *Pender*, L. R. 9 Q. B. 531, 43 L. J. N. S. Q. B. 227, 30 L. T. N. S. 547, 22 W. R. 884. *Lynch* v. *Dunsford*, 14 East 494. *Lynch* v. *Hamilton*, 3 Taunt 37.

(*h*) *De Winton's Case*, 34 L. T. 942

(*i*) *Burgess and Stock's Case*, 2 J. & H. 441, 31 L. J. Ch. 749, 10 W. R. 816.

(*k*) *Athenæum Life Insurance Co.* v. *Pooley*, 3 De G. & J. 294, 28 L. J. Ch. 119, 1 Giff 102, 5 Jur. N. S. 129. *Wood's claim*, 30 L. J. Ch. 373, 3 L. T. N. S. 878, 9 W. R. 366. *Brown's claim*, 10 W. R. 662.

for return of a part of the premium in certain events or on the doing by the assured of certain things. Such agreements when made are to be construed by the Court. By them, if the insurer is given a discretion to return the part, the Court will not interfere with the exercise of such discretion by the insurer or his agents if reasonably exercised (*l*).

In the absence of such a discretionary power reserved by the contract, the insurer will be bound to return the premium on the occurrence of the events or doing of the things specified.

Policy at variance with proposals. Return of premium.—Where the policy does not accord with the proposals, there is no contract, and consequently the premium if paid must be repaid (*m*), unless the variance is the result of mutual mistake, in which case the policy may be rectified.

Premiums must be paid punctually.—Where it is stipulated that premiums shall be paid by a certain date, they must be so paid or the policy is voidable[7] at the election of the insurers (*n*), who may, however, waive the forfeiture, but are under no equitable obligation to do so, upon tender of the premiums due (*o*).

If an agent is designated as receiver and is changed, delay due to such change not notified to the assured will not create a forfeiture (*p*).

So also if a foreign company gives up its office in *the [* 92] domicile of the assured, and has no legally constituted agent there (*q*).

Who to pay premiums.—Payment of premiums must be made by the assured or by his authorized agent. Payment by the volunteer is not performance of the condition in a policy (*r*).

Whether demand requisite.—The insurer need not demand the premiums, and if the insured does not receive the usual notice[8] that a

(*l*) *Manby* v. *Gresham Life Co.*, 9 Beav. 439, 31 L. J. Ch. 94, 4 L. T. N. S. 847, 9 W. R. 547, 7 Jur. N. S. 383.

(*m*) *Fowler* v. *Scottish Equitable Co.*, 4 Jur. N. S. 1169, 28 L. J. Ch. 225, 7 W. R 5, 32 L. T. 119.

(*n*) See *Klein* v. *New York Life*, 104 U S (14 Otto) 88 (Sup. Ct. U S.), and *Thompson* v. *Insurance Co.*, 104 U. S. (14 Otto) 252. *Phœnix* v. *Sheridan*, 8 H. L. C. 745, 31 L J. Q. B 91, 7 Jur. N. S. 174, 3 L. T. N S. 564.

(*o*) *Cotton States* v. *Lester*, 35 Am Rep. 122, and cases in notes thereto. *Thompson* v. *Insurance Co.*, 14 Otto (104 U S. 258

(*p*) *Insurance Co* v. *Eggleston*, 96 U. S (6 Otto) 572. *Seaman's Co.* v *N W. Ins. Co.*, 1 McGray (U S. Circ. Ct) 508.

(*q*) *Dorion* v. *Positive*, 23 Lr. Can. Jur. 261

(*r*) *Whiting* v. *Massachusetts Co.* 129 Mass. 240. See also *Falcke* v. *Scottish Imperial Co.*, 34 Ch D. 234.

[7] The fact that one, when his life insurance premium became due, was so sick and delirious until he died that he could do nothing about it. Held, not a case of impossibility cause by act of God, such as to prevent a forfeiture. *Carpenter* v. *Centennial Mut. Life Asso.*, 68 Iowa 453.

[8] If uniform practice of life insurance company has been to notify insured of amount due on his premium notes, it cannot enforce forfeiture stipulated for in policy in case of his failure to pay promptly, where it fails to give him the usual notice. *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 156. *Alexander* v. *Continental Ins. Co.*, 67 Wis. 422.

premium is due, and consequently omits to pay within the days of grace, he has no equity to recover on a policy which has lapsed or or been forfeited by the default, though such omission as aforesaid has been purely accidental and in no sense intentional (*s*).

But a company cannot set up the failure of the deceased to pay premiums as a defence to an action upon the policy, where from the course of dealing between the parties the assured had a right to believe that notice would be given to him of the amount due when the company required it to be paid, and that a receipt therefor would be sent to the bank (*t*).

Days of grace.—When an insurance extends over a period of time during which more than one premium will become payable, a certain number of days—called days of grace—the number of which is usually fifteen, are allowed beyond the due day for the payment of the premiums. If a loss happen during these days of grace and whilst the premium is unpaid, the assured will have no right of action (except by express stipulation) for the amount of the policy.[a] The legal effect of the days of grace is not to entitle the assured to recover for a loss during those days whilst the premium is un-
[* 93] paid, but to enable the insurance to be *renewed and save the expense of a new policy and fresh stamps (*u*).

Effect of days of grace is to give time to renew policy. Insurer may terminate insurance at end of year notwithstanding days of grace.—In giving judgment for the defendants in *Tarleton* v. *Staniforth*, Lord Kenyon said: "No policy is to have existence until the premium is paid by one party and accepted by the other. In this case the loss unfortunately happened in that interval of time when it was in suspense whether or not the policy would be renewed; for at that moment the plaintiff had not offered to pay, and of course the trustees had not accepted, the premium for the next half-year. I am therefore clearly of opinion that the defendants are not liable" (*x*).

This decision was pronounced on the 4th July 1794, and in consequence of it the Sun Fire Office on the 10th of the same month published in the public newspapers an advertisement stating that "all persons insured in this office by policies taken out for one year or for a longer term are and always have been considered by the managers as insured for fifteen days beyond the time of the expiration of their policies." After this advertisement one Salvin effected a policy and paid the premium, but before the expiration of the

(*s*) *Windus* v. *Tredegar*, 15 L. T. N. S. 108 (H. L.). *Thompson* v. *Insurance Co.*, 104 U. S. (14 Otto) 252.

(*t*) *Attorney-General* v. *Continental Life*, 33 Hun (N. Y. 138

(*u*) *Tarleton* v. *Staniforth*, 5 T. R. 695. *Want* v. *Blunt*, 12 East 183.

(*x*) *Tarleton* v. *Staniforth*, 5 T. R. 695.

[a] Where a policy does not stipulate that failure to pay note when due shall avoid policy, and where extension has been granted, and death occurs before expiration of time as extended, policy is not avoided. *Kansas Protective Union* v. *White*, 36 Kan. 760.

year the office gave him notice that unless he agreed to pay an increased premium they would not continue the insurance. To this the assured refused to accede, and his premises were destroyed by accidental fire after the expiration of the current year, but within the fifteen days. The policy had been effected subject to the following article:—"On bespeaking policies all persons are to make a deposit for the policy stamp-duty, and shall pay the premium to the next quarter-day and from thence for one year more at least; and shall, as long as the managers agree to accept the same, make all future payments annually at the *said office within [*94] fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place until the premium is actually paid by the insured, his, her, or their agent or agents." When the loss happened, the plaintiff had not paid or tendered the premium for another year, and the office resisted his claim. Lord Ellenborough, in giving judgment against the plaintiff, said: "The effect of the article and advertisement is to give the parties an option for fifteen days to continue the contract or not, with this advantage on the part of the assured, that if a loss should happen during the fifteen days, though he have not paid his premium, the office shall not after such loss determine the contract, but that it shall be considered as if it had been renewed; but this does not deprive them of the power of determining the contract at the end of the term, by making their option within a reasonable time before the end of the period for which the insurance was made. Where the premium is received the effect of it is to give the assured an assurance for another year, to be computed from the expiration of the first policy, and not from the expiration of the following fifteen days. The office cannot determine the policy after the year during fifteen days of the following year in case a loss should happen during that period. But the office has the power at any time during the year of saying to the assured, 'We will not contract with you again, we will not receive from you the premium for another year;' and by such declaration the object would cease for which the fifteen days were allowed, and as no premium would be in such case to be received, no indemnity could be claimed in respect of it. The consideration for the indemnity during the fifteen days is the premium which must be paid during that period, but when that cannot be any longer looked to or expected, the right to the indemnity determines also" (*y*).

**Payment of overdue premium, insurer and insured being ignorant that life has dropped.*—Payment of premium after it is [* 95] overdue, and after the death of the life, of which both the insurer and the insured were unaware, will not rehabilitate the insurance so as to entitle the insured to the policy-money (*z*).

(*y*) *Salvin* v. *James*, 6 East 571.

(*z*) *Pritchard's* v *Merchants', &c., Co.* 3 C. B. N. S. 622, 27 L. J. C. P. 169, 30 L. T. 318, 2 Jur. N. S. 307, 6 W. R. 340.

Acceptance by agent of premium after days of grace.—The local agent of an insurance company has no authority to bind the company by the acceptance of the premium after the days of grace have expired.

Debiting agent with premium—Mere debiting the agent with the premium by the company is not equivalent to a payment to the company by the assured (*a*).

Acceptance of premium by agent after days of grace.—Acceptance of the premium by the agent after the fifteen days, and debiting the same to him in the company's books, will not amount to evidence of a new agreement between the company and the assured (*b*).

Promise by agent to pay premium.—A promise by the treasurer of an insurance company to see the premium paid does not bind the company, for he cannot pay them out of their own funds, and if he agrees to pay out of his own pocket the remedy of the assured would be against him and not against the company if he failed to do so (*c*).

What amounts to payment of premiums. Cross accounts.—Where two insurance companies had cross accounts, or insurances mutually granted, and, by their course of dealing, premiums due on policies effected by one company with the other were not paid in cash, but a receipt was given for each premium as if so paid within the time limited for the payment, and the premiums were entered as paid in the accounts, the accounts were settled from time to time, the balance struck, and payment made of the balance. A receipt [* 96] was thus *given for a premium on a policy effected by plaintiffs with defendants within the time for payment, and the amount was entered in account as paid by the plaintiffs. After the time for payment had elapsed, but before the next settlement of the current account, the life died. It was held that there had been a payment of the premium sufficient to keep the policy alive (*d*).

And where the agents of an insurance company remitted to the company £100 "for premiums," such sum being in excess of the amount due, and the company had been urging the agents to renew certain lapsed policies, the contracts regarding which had been arranged, it was held that although the company did not, in their books, specifically appropriate any part of the £100 to the renewal of the lapsed policies, they must be taken to have received the excess part of such sum in respect of them (*e*).

Last premium due before death not paid. Policy-money paid by mistake.—Mr. Solari effected a policy of insurance on his life with the

(*a*) *Frazer* v. *Gore District Co.*, 2 Ontario Rep. 416.

(*b*) *Acey* v. *Fernie*, 7 M. & W. 151, 10 L. J. Ex. 9. *Busteed* v. *West of England*, 5 Ir. Ch. 553.

(*c*) *Buffum* v. *Lafayette Mutual Fire*, 85 Mass. (3 All.) 360.

(*d*) *Prince of Wales Assurance Co.* v. *Harding*, 1 E. B. & E. 183 27 L. J. Q. B. N. S. 297, 4 Jur. N. S. 851. *Busteed* v. *West of England Co*, 5 Ir. Ch. 553.

(*e*) *Kirkpatrick* v. *South Australian Insurance Co.*, 11 App. Cas. 177.

Argus Insurance Company, and died without having paid the last premium. The actuary of the company informed two of the directors that the policy had lapsed by reason of the non-payment of the premium, and one of such directors wrote on the policy in pencil the word "lapsed." Subsequently, however, the insurance-money was paid to the executor of Mr. Solari, the directors who drew the cheque having forgotten the lapse of the policy. Lord Abinger, in giving judgment, said: "If the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may be also cases in which, although he might by investigation *learn the state of facts more ac- [* 97] curately, he declines to do so, and chooses to pay the money notwithstanding. In that case, there can be no doubt, he is equally bound. Then there is a third case, where the party had once a full knowledge of the facts, but has since forgotten them. I think the knowledge of the facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment" (*g*).

Insurance "lost or not lost." No return of premium.—When the risk is undertaken in any event, whether the thing to be insured is lost or not lost, burnt or not burnt, living or dead, the risk is based on the uncertainty in the minds of assurer and assured, and no return of premium can be had, except for fraud of the insurer, since the policy attaches (when made) irrespectively of the condition of the subject-matter, such a policy being grounded on ignorance of both parties as to the state of the thing insured, instead of on knowledge of its safety and soundness (*h*).

Premiums not apportionable.—Premiums are especially excepted from the operation of the Apportionment Act, 1870 (*i*), which enacts that "nothing in this Act contained shall render apportionable any annual sums payable in policies of assurance of any description."

Refusal to receive premiums. Remedy.—Refusal to receive premiums after the risk has been accepted is ground for action for damages (*k*), and it would seem that an action will lie for specific performance of a contract to insure or grant a policy (*l*) or for a declaration that there is a valid and subsisting insurance.

**Where policy ultra vires premium must be returned.*—Where [* 98]

(*g*) *Kelly* v. *Solari*, 9 M. & W. 54.

(*h*) *Giffard* v. *Queen Insurance Co*, 1 Han. (New Bruns.) 432, 439, per Ritchie, C. J., now C. J. of Supreme Court of Canada.

(*i*) 33 & 34 Vict. c. 35, s. 6.

(*k*) *M'Kie* v. *Phœnix*, 28 Missouri 383. *Day* v. *Connecticut Co.*, 45 Conn. 480.

(*l*) *Linford* v. *Provincial Horse and Cattle, &c., Co*, 34 Beav. 291, 10 Jur. N. S. 1066, 11 L. T. N. S. 370, 5 N. R. 29. *Penley* v. *Beacon, &c. Co.*, 7 Grant (U. C.) 130. *Day* v. *Connecticut Co.*, 45 Conn. 480.

a contract of insurance is *ultra vires*, the would-be insurer can only exonerate himself from liability under such a contract by repaying the premiums which he has gained by the contract (*m*).

Such a case arises where the policy is made with a corporation whose powers are limited by statute, charter, articles of association, or otherwise, and such powers are exceeded.

(*m*) Re *Phœnix Co., Burgess and Stock's Case*, 2 J. & H. 441, 31 L. J. Ch. 749, 10 W. R. 816.

*CHAPTER IV. [*99]

THE RISK.

Fixing the premium.—The most important part of insurance is determination of the risk. The insurer can only adjust his premium profitably if he knows accurately the nature of the risk which he is asked to take upon himself; and the assured, if he withholds from the insurer any necessary data for estimating the nature of the risk, which he ought to have supplied to the insurer, will, when a loss occurs, find that he has been insured only in name, and that by his own inadvertency he loses not only his property but probably also his premiums (*a*). For the rule that the utmost good faith must be observed, which is peculiar to this contract, requires that the insurer should be as well informed as the assured of all the circumstances constituting or increasing the risk which is offered to the insurer (*b*), and if he is not so informed in fact, from whatever cause, he is not liable to give any indemnity.

Time policies.—Most policies of insurance other than marine, and many marine policies, are time policies, taken out for a fixed and certain period of time. Under such policies the assurance expires at the latest moment of the last day therein named (*c*), unless a special time is named in the policy. And even if the days of grace are passed, many insurers will, if no loss has happened and no increase of risk has occurred, allow the policy *to be re- [*100] habilitated on payment of the arrears with or without a fine for delay.

Sometimes attempts are made to construe time policies as voyage policies (*d*), but the Courts have not encouraged them.

Voyage policies on land.—Voyage policies against land risks are sometimes taken out, but are not so common as time policies. They cover the things insured between certain geographical limits. Practically they impose upon the insurer the liability of the common carrier between the two ends of the journey. The risk begins in such policies when the goods start or get into the carrier's hands (*e*), and continues from thence until arrival in the hands of the

(*a*) *Sibbald* v. *Hill*, 2 Dow (H. L) 263.

(*b*) *Vide* per Shee, J., in *Bates* v. *Hewitt*, L. R. 2 Q. B. 595, 610, 36 L. J. Q. B. 282, 15 W. R. 1172. See art. 2485, Civil Code of Lr. Can., which accords with English Law.

(*c*) *Isaacs* v. *Royal*, L. R. 5 Ex. 296, 39 L. J. Ex. 189, 22 L. T. N. S. 681, 18 W. R. 982.

(*d*) *Crowley* v. *Cohen*, 3 B. & Ad. 478, 1 L. J. N S. K. B. 158. *Joyce* v. *Kennard*, L. R. 7 Q. B. 78, 41 L. J. Q. B. 17, 25 L. T. N S. 932, 20 W. R. 233.

(*e*) *Boehm* v. *Combe*, 2 M & S. 172.

consignee or other specified determination of the transit, but it will not continue during a deviation (*f*). In some cases the carrier makes himself the insurer. Thus railway companies will grant insurances on goods carried by them for the safe carriage of which they are not liable under the Carriers Acts. No questions as to days of grace or the like can arise on voyage policies, since under the contract the liability lasts for the whole journey. The real question is, what constitutes arrival? A common case of voyage policies on land risks is that of railway insurance tickets for a particular journey. Undoubtedly these would not cover an intentional deviation from the route for which they were issued, but would cover risk of an accident caused by the points going wrong, and diverting the train from the direct route to a branch line.

Before delivery of policy.—The commencement of the risk in the absence of special stipulation is not conditional on the de-
[*101] livery to *the assured of the policy, provided that the first premium is paid, and that the contract is in all other respects complete, and in such a case even death before complete delivery of the policy is no bar to recovery unless so stipulated (*g*). And where a fire occurred after the deposit was paid to an agent, but before the policy was issued, the company was held liable (*h*).

Risk entire.—The risk taken is entire. If it has once attached no apportionment of premium can take place, even if the policy subsequently becomes forfeit (*i*). Questions occasionally arise as to whether the risk is taken from year to year or from quarter to quarter (*k*); and in a case where, the annual premium being payable by quarterly installments, with a proviso that, if the assured should die before the whole of the quarterly payments become payable, the company should retain from the sum assured sufficient to pay the whole of the premiums for that year, the party died within the first twelve months after the third quarterly installment was due but before it was paid, it was held that the assured could not recover, as the installment had not been punctually paid (*l*).

Policy—covers several losses up to amount insured.—A policy for a year covers all losses within the year up to the amount named. If half-a-dozen small fires happen, the insurer must pay the damage on each. And it would seem that if a fire to the full amount hap-

(*f*) *Pearson* v. *Commercial Union*, 1 App. Cas. 498, 45 L. J. C. P. 761, 35 L. T. N. S. 445, 24 W. R. 951. But see *Charleston Railroad Co.* v. *Fitchburg Mutual Fire*, 73 Mass. 64, where carriages in use on a railway were held to be insured on a branch not owned by the assured.

(*g*) *Cooper* v. *Pacific Mutual*, 8 Am. Rep. 705. *Newman* v. *Belsten*, 76 L. T. 228, affd. in C. A. Feb. 14, 1884. *Canning* v. *Farquhar*, 16 Q. B. D. 727, 55 L. J. Q. B. 225, 34 W. R. 423.

(*h*) *Mackie* v. *European Assurance Co.*, 21 L. T. N. S. 102, 17 W. R. 987.

(*i*) *Tyrie* v. *Fletcher*, 2 Cowp. 668, 33 & 34 Vict. c. 35.

(*k*) *Want* v. *Blunt*, 12 East 183.

(*l*) *Phœnix Life Assurance Co.* v. *Sheridan*, 8 H. L. C. 745, 31 L. J. Q. B. 91, 8 L. T. N. S. 564, 7 Jur. N. S. 174.

pened for which the assured was indemnified from other sources, his policy would still be alive for the rest of his year and in case of another fire (*m*).

This view must, it is submitted, be correct, for it would seem [102] absurd to contend that if a pair of curtains had been burnt and paid for, the whole liability of the insurer was thereby extinguished for the year (*n*). The only mode of extinguishing liability during the year is actually paying damage to the full amount insured. On the other hand, as soon as the maxium sum insured is paid in respect of a loss, the insurer's liability is exhausted, although the year has not expired.

Termination of fire risk.—In fire policies the insurers frequently reserve the right to terminate the insurance either at the end of a year or period for which a premium is paid, or at any time on repaying the unearned proportion of premium. If they elect to terminate before, but do not repay the premium till after a fire, it would seem their election is still valid (*o*), as the notice may operate from its delivery, and need not name a future day for termination (*p*). Notice to the assured's agent for procuring the insurance will usually be insufficient. Under ordinary circumstances the notice should be given to the assured himself (*q*).

Duration of risk.—The duration of a life risk is purely a matter of contract, and it depends on the terms of the policy under which each insurance is made whether the insurer can, or cannot, terminate the insurance and refuse further premiums.

Word "from."—The dates between which the policy is expressed to endure may be exclusive or inclusive, according to the form of expression used, and the context and subject matter. In old policies the words "for one year from the date" are found, and that raised a doubt *whether the first day was exclusive [* 103] or inclusive (*r*). At present all well-drawn policies name the days when insurance will begin and end, and whether such days are exclusive or inclusive, and even the hour of the day at which the insurer's liability ceases. If the hour were not specified, the insurance would continue to the last minute of the day, for ambiguous and doubtful phrases would be construed against the company. "Verba fortius accipiuntur contra proferentem."

Word "until."—The word "until" in a policy of insurance in-

(*m*) *Smith* v. *Colonial Mutual*, 6 Victoria L. R. 200. See *Crawley* v. *Cohen*, 3 B. & Ad. 478, 1 L. J. N. S. K. B. 158.

(*n*) See *Crawley* v. *Cohen*, 3 B. & Ad. 478, 1 L. J. K. B. 158 (1832), deciding against a contention that the policy was exhausted when goods to the amount named therein had been carried in the plaintiff's canal barges.

(*o*) *Cain* v. *Lancashire*, 27 U. C. (Q. B.) 217.

(*p*) *Ibid.*, 453.

(*q*) *Grace* v. *American Insurance Co.*, 109 U. S. (2 Davis) 278.

(*r*) *Pugh* v *Duke of Leeds*, 2 Cowp. 714, Lord Holt's view in *Howard's Case*, 2 Salk. 625, 1 Lord Raym. 480, not followed. *Isaac* v. *Royal Exchange*, L. R. 5 Ex. 296, 39 L. J. Ex. 189, 22 L. T. N. S. 681, 18 W. R. 982.

cludes and extends the insurance over the last day of the period for which it is effected. Thus certain goods were insured against fire by a policy in which the insurance was expressed to be "from the 14th Feb. 1868 until the 14th Aug. 1868, and for so long after as the assured should pay the sum of 225 dollars at the time above mentioned." The goods were burnt in the night of 14th August 1868, the insurance not having been renewed, and it was held that the insurance continued during the 14th August, and the loss was therefore covered by it (*s*).

Life policies. Duration of risk.—If a man receives a mortal wound or contracts a mortal disease within the period for which the insurance is expressed to continue, death must ensue within such period to enable the policy-money to be recovered.

Death must occur during insurance.—If it occurs ever so short time afterwards, the liability of the insurer is extinct (*t*). Life policies being in most cases for whole life, the question arising is usually not whether the death is within the time, but whether it is within the terms of the policy. But the other case occasionally [* 104] arises. Men have *sometimes been too ill to think about business when the time for paying their premiums come (*u*), and if they die of the illness without the premium having been first paid, their representatives are at the mercy of the insurers. The Court will construe the policy according to its express terms, and will not hold it sufficient that the conditions therein contained had been complied with as nearly as may be. *Cy près doctrine inapplicable.*—In *Want* v. *Blunt* (*x*) the stipulation was that the assured should pay the premiums on a certain day with fifteen days' grace. He died within the days of grace, and his executors paid the premiums within them. But the Court of Queen's Bench interpreted the policy as meaning that the assured must be alive to pay the premium, and that the policy had expired in the ordinary course on the day when the new premium fell due (*y*).

Elements of the risk.—All facts and circumstances diminishing or increasing the likelihood that the event insured against will happen sooner or later are elements (*z*) constituting the risk to be undertaken by the insurer.

Perils ab intra.—In insurance against fire an exact (*a*) description

(*s*) *Isaacs* v. *Royal Insurance Co.*, L. R. 5 Ex. 296, 39 L. J. N. S. Ex. 189, 22 L. T. N. S. 681, 18 W. R. 982.

(*t*) *Lockyer* v. *Ottley*, 1 T. R. 254. In accident policies it is otherwise by express stipulation.

(*u*) *Want* v. *Blunt*, 12 East 183 (1810).

(*x*) 12 East 187.

(*y*) In America a case occurred where a man on his way to pay his premium was paralysed and died. *Howell* v. *Knickerbocker*, 4 Am. Rep. 675, 44 N. Y. 276. The Court, not unanimously, upheld the policy.

(*z*) See *Boyd* v. *Dubois*, 3 Camp. 133. *Taylor* v. *Dunbar*, L. R. 4 C. P. 206, 38 L. J. C. P. 178, 17 W. R. 382.

(*a*) *Freedlander* v. *London Assurance*, 1 M. & Rob. 171. *Dobson* v. *Sotheby*, M. & M. 90.

of property to be insured is most material in determining the risk (*b*). A wooden house in a town is far more likely to be burned down than a brick or stone building. A house in a street which has a party-wall running right up to the roof is not in the same danger from fires in adjacent buildings as one not so divided off. A *detached house is only subject to risks of fire from within. [* 105] And some articles, such as gunpowder and petroleum, are only insurable at very high rates if insurable at all, while iron and stone in an ironmaster's or stonemason's yard will rarely need insurance at all. Insurers will not usually insure against the inherent vices of anything, such as liability to spontaneous explosion or combustion (*c*); so if a horse is to be insured his vices are elements in the risk, as would be the state of a haystack.

Elements of risk.—When a house is insured, not only its character and construction are elements in the risk, but also its locality; for an insurance against fire necessarily has regard to the locality of the subject-matter of the policy, the risk being probably different according to the place where the subject of insurance happens to be (*d*). This has been held of a fire policy for three months on a ship in wet dock with liberty to go into dry dock, and the assured failed to recover because the vessel got outside the permitted limits, and was there burnt (*e*).

Any special fact as to neighbouring buildings which would increase the risk must also be disclosed; *e. g.*, that a fire has just happened next door (*f*).

If the thing insured is personal property, the removal of it usually ends the insurance (*e*).

Locality had regard to.—There are many cases of land insurance on movable things, such as railway stock, carriages, agricultural implements, and goods in transit. In such cases the position of the thing is not so essential to *the risk as in insurance [* 106] on houses and furniture. But even they are insured within certain limits, and if burnt or lost outside these limits, there would be small chance of recovery (*g*). Thus if a Cheshire Salt Company's waggon insured between Nantwich and London had, by mistake of the London and North-Western Railway, been carried

(*b*) *Newcastle Fire Co.* v. *M'Morran*, 3 Dow. (H. L.) 255. *Quin* v. *National Insurance Co*, Jones & Carey 316 (Ir.). *Stokes* v. *Cox*, 1 H. & N. 320, 26 L. J. Ex. 113, 28 L. T. 161, 3 Jur. N. S. 45, 5 W. R. 89. *Sillem* v. *Thornton*, 3 E. & B. 868, 2 W. R. 524, 23 L. J. Q B. 362, 23 L. T. 187, 18 Jur. 748.

(*c*) *Dudgeon* v. *Pembroke*, 2 App. Cas. 296, 46 L. J. Q. B. 409, 36 L. T. N. S. 882, 25 W. R. 499

(*d*) *Pearson* v. *Commercial Union*, 1 App. Cas. at 505, 45 L. J. C. P. 761, 35 L. T. N. S. 445, 24 W. R. 951. *Rolland* v. *North British and Mercantile*, 14 Lr. Can. Jur. 69. *M'Clure* v. *Lancashire*, 6 Ir. Jur N S 63, 72.

(*e*) *Gorman* v. *Hand-in-hand*, Ir. L. R. 11 C L 224; and as to the American views on the subject see *English* v. *Franklin Co*, 54 Am. Rep. 377, and *Nozas* v. *North-Western Co.*, 54 Am. Rep. 631.

(*f*) *Bufe* v. *Turner*, 6 Taunt. 338.

(*g*) *Pearson* v. *Commercial Union*, *ubi supra*. *Grant* v. *Etna*, 8 Jur. N. S. 705, 15 Moore P. C. 516, 10 W. R. 772, 6 L. T. N. S. 785.

off on to the North Wales line by the goods train which occasioned the Abergele accident, it would probably be open to the insurers of that waggon to contend that such deviation relieved them, and that the London and North-Western Railway, only, if any one, would be liable.

Life policy local.—And in the case of a life policy expressed to insure against risk in a certain latitude, if the assured go to a more insalubrious latitude and there die, his representatives cannot recover on the policy (*h*).

Locality. What within risk.—Tobacco was insured as in Nos. 189, 191, of a street. It never was in either, but in 187. The Court declined to rectify the policy on the ground of mutual mistake, and would not alter it on the ground that the agents would have, with equal readiness, taken the risk in 187. The ground of decision was that locality is important, and that if it is specified the risk cannot be extended even to an adjoining building (*i*).

Only those goods are within the risk which are in the place specified. The policy does not cover them if removed, except by assent of the insurers attested by indorsement on the policy (*k*).

[*107] **Insurance local.*—In *Rolland* v. *North British and Mercantile* (*l*) (a Canadian case), Mackay, J., said, "The place in which things are is always a *motif determinant* of the contract. It is of the essence thereof that the things and their position should be known by both parties. When goods are insured in a building, all information should be communicated to the insurer to enable him to appreciate the risk; *e. g.*, of what materials the building is, its situation, distance from other buildings, whether connected with others, and so forth. *Full information necessary.*—There must be perfect understanding as to the thing insured, otherwise there is no convention."

And in mercantile fire policies, no risk is taken of goods loading or unloading unless specially bargained for.

A fire risk does not include the risk of household furniture during removal, and it is consequently necessary either to insure (if desired) during removal, if it be to a great distance, or to make the carrier take the risk of fire.

Goods covered ascertainable at date of fire.—Whether a policy covers goods in a place at the time of a fire, or only those which were there at the time when the policy was made and continue to be

(*h*) See *Reed* v *Lancaster Fire Co.*, 90 N. Y, 302. *Fowler* v. *Scottish Equitable*, 28 L. J. Ch. 225, 4 Jur. N. S. 1169, 7 W. R. 5, 32 L. T. 119.

(*i*) *Severance* v. *Continental Insurance Co.*, 5 Bissell (U. S. Cir. Ct.) 156. See *Pearson* v. *Commercial Union*, 1 App. Cas. 428, *supra*. *Horden* v. *Commercial Union*, 5 N. S. W. Law 309, affd. in P. C. 1887. *Rolland* v. *North British and Mercantile*, 14 Lr. Can. Jur. 69. *Sampson* v. *Security Insurance Co.*, 138 Mass. 49.

(*k*) *Theobald* v. *Railway Passengers' Co.*, 10 Ex. 45, 18 Jur. 583, 23 L. J. Ex. 249, 23 L. T. 222, 2 W. R 528. *M'Clure* v. *Lancashire Fire*, 6 Ir. Jur. N. S. 63. *Rolland* v. *North British and Mercantile*, 14 Lr. Can. Jur. 69.

(*l*) 14 Lr. Can. Jur. 69.

there at the time of the fire, depends on the wording of the policy or whether the goods are generally described or specifically indicated (*m*).

Following this rule, the Irish Exchequer decided that new hay put on a rick which had been specifically insured, in substitution for hay which was thereon at time of insurance, was not within the policy (*n*).

If goods not specified, fire policy covers all to amount named.—Where no specific description is given it would seem that a fire policy will cover goods in the place named *to the amount, [* 108] regardless of the bringing in or taking out of particular (*o*) articles, and taking account only of the quantity on the premises at time of the fire and the interest of the assured therein. But an ordinary fire policy is not like a merchant's floating policy in the mode in which the damage is calculated (*p*). The method indicated in *Crowley* v. *Cohen* (*q*) only applies to policies where the risk is in several vehicles of transport. Nor will an ordinary household fire policy include the property of visitors or servants.

The risk varies as the mode of user, and insurers classify fire risks in buildings very much, according to the use to which they are put.

User of subject of insurance.—It is sufficient to state the use. The assured need not communicate facts relating to the general course of the particular trade for which the premises insured, or containing the things insured, are used, as all these things are supposed to be within the knowledge of the insurer (*r*).

Insurance on vacant buildings.—That a house is empty also increases the risk. But this would be rather because the house while vacant would be unguarded, than because such occupany comes under the head of user.

In America leaving a house vacant is not deemed a sufficient ground for avoiding a policy, except where special stipulations are made to that effect (*s*); and even where the policy contains stipulations as to occupation, mere temporary absence is not deemed fatal to the claim of the assured (*t*). Where a statement of intention to use the thing insured in a particular manner *did [* 109]

(*m*) *Halhead* v. *Young*, 6 E. & Bl. 812, 2 Jur. N. S. 970, 25 L. J. Q. B. 290, 27 L. T. 100, 4 W. R. 530. *Harrison* v. *Ellis*, 7 E. & Bl. 465, 3 Jur. N. S. 908, 26 L. J. Q. B. 289, 29 L. T 76, 5 W. R. 494.

(*n*) *Gorman* v. *Hand-in-Hand*, I. R. 11 C. L. 224 (1877). *British American Insurance* v. *Joseph*, 9 Lr. Can. Rep. 448.

(*o*) *Butler* v. *Standard Fire*, 4 U. C. (App.) 391. *British American Insurance Co.* v. *Joseph*, 9 Lr. Can. Rep. 448. *Crozier* v. *Phœnix Co.*, 2 Han. (New Bruns.) 200.

(*p*) *Thompson* v. *Montreal* (1850), 6 U. C., (Q. B.) 319, per Robinson, C. J. *Peddie* v. *Quebec Co.*, Stuart (Lr. Can.) 174 (1824).

(*q*) 3 B. & Ad. 478, 1 L. J. O. S. K. B. 158.

(*r*) Per Shee, J., in *Bates* v. *Hewitt*, L. R. 2 Q. B. 595, at 610, 28 L. J. Q B. 282, 15 W. R. 1172.

(*s*) *Cattlin* v. *Springfield Ins. Co.*, 1 Sumner (U. S.) 434, per Story, J.

(*t*) *Shackleton* v. *Sun Fire Office*, 54 Am. Rep. 379.

not amount to a warranty that it should only be so used, the assured could recover although there had not been such user (*u*).

Steam-engine, user of.—The presence of a steam-engine on premises must be stated, but when it is known to be there, it need not be confined to one specific use unless so stipulated; and a mere increase of danger in a new method of using a machine will not vitiate the insurance unless there be a condition to that effect (*v*). In *Baxendale* v. *Harding* a steam-engine was specified in a policy, but subsequently it was attached to a horizontal shaft which was carried through a floor and connected with other machines erected after the insurance was effected. The insurers were unaware of the erection of these machines, but on the premises being burnt the assured recovered from the company (*w*).

Alterations.—Where alterations or new erections are made and assented to with or without extra premium, damage by fire originating in the new buildings will be within the policy (*x*). And under an ordinary policy the insurers will be liable for a house altered during its currency if such alterations do not increase the risk. But there may be no liability for a fire occurring during the progress of the work, as what is called "builder's risk" is materially greater than that of an ordinary dwelling-house.

Exceptional use of premises for purposes other than specified in policy, even though risk increased, does not prevent assured recovering.—In the absence of fraud a policy is not avoided by the circumstances that subsequently to the effecting of the policy a more hazardous trade has without notice to the company been carried on upon the premises. Thus, where premises were insured against fire by the [*110] *description of a granary and "a kiln for drying corn in use" communicating therewith, the policy was to be forfeited unless the buildings were accurately described and the trades carried on therein specified; and if any alteration were made in the building or the risk of fire increased, the alteration or increased risk was to be notified and allowed by indorsement on the policy, otherwise the insurance to be void. The assured carried on no trade in the kiln except drying corn, but on one occasion, without giving any notice to the insurers, he allowed the owner of some bark which had been wetted to dry it gratuitously in the kiln, and this occasioned a fire by which the premises were destroyed. Drying bark was a distinct trade from drying corn, and more hazardous, and insurers charged a higher premium for bark-kilns than

(*u*) *Grant* v. *Etna Insurance Co.*, 15 Moore P. C. 516, 8 Jur. N. S. 705, 10 W. R. 772, 6 L. T. N. S. 785.

(*v*) *Whitehead* v. *Price*, 2 Cr. M. & R. 447, 1 Gale 151. *Mayall* v. *Mitford*, 1 N. & P. 732, 6 Ad. & E. 670. *Baxendale* v. *Harding*, 4 H. & N. 445, 28 L. J. Ex. 236, 7 W. R. 494.

(*w*) *Baxendale* v. *Harding*, *supra*.

(*x*) *Mackenzie* v. *Van Sickles*, 17 U. C. (Q. B.) 226.

corn-kilns; but it was held that the assured was not precluded from recovering (*y*).[1]

In the case of *Pim* v. *Reid*, Pim carried on the business of a papermaker, and effected an insurance on the premises in which the business was carried on. Subsequently a large quantity of cotton waste was cleaned and dyed there. At the time of the fire some of this cotton waste was in the mill, and it appeared that insurance offices generally declined to insure premises where it was kept or used, yet the company was held liable (*z*). The *ratio decidendi* in these cases appears to be that nothing short of an express and apt stipulation will be deemed sufficient to interfere with the assured's ordinary liberty to use his property as he wishes.

Character of building. Coffee-house not inn.—It was held in a case at the beginning of the century that a coffee-house did not come under the head of inns, which are within the class of doubly hazardous buildings, and that insurance thereof at the ordinary rate would not be void. But the question was raised *by a landlord seeking to eject for breach of covenant to in- [* 111] sure, and not by insurers (*a*).

Character of assured.—The character of the person assured is also material to the risk (*b*). This is the principal reason for the conditions restricting assignment usually inserted in fire policies. There is this difference between the assignment of land and sea policies, that in the former case the subject-matter is generally within the control of the assignee, while in the latter both ship and goods are on the high seas and cannot be prejudicially affected by the assignment to a person who, though he owns them, cannot affect their condition till they reach port and the risk ends. The happening of many previous fires on the assured's premises goes to character and must be disclosed.

Title to the property.—The title to the property of the assured is to some extent material to the risk: for an insurance without interest or title is an inducement to arson, offering prospects of profit. This, however, is met by the statute 14 Geo. III. c. 48, precluding the insured from recovering beyond his interest. In America, in the absence of the statute, the Courts have met the difficulty by invoking the principles and policy of the Common Law (*c*).

Insurers usually demand to be informed whether the interest in the house or property insured amounts to total or partial, absolute or limited, ownership. But in this country, as regards houses, pre-

(*y*) *Shaw* v. *Robberds*, 6 A. & E. 75, 6 L. J. N. S. K. B. 106, 1 Nev. & Per. 279

(*z*) 6 M. & G. 1, 12 L. J. C. P. 299.

(*a*) *Doe d. Pitt* v *Laming*, 4 Camp. at 76, per Lord Ellenborough (1814).

(*b*) *Lynch* v. *Dalzell*, 4 Bro. P. C. 431, cited 2 Ad. & E. 577.

(*c*) *Warnock* v. *Davis*, 104 U. S. (14 Otto) 779.

[1] Court will not presume that the alteration of a flouring mill from a burr process to the roller process increases the risk. *Plantero Mutual Ins. Co.* v. *Rowland*, 66 Md. 286

cautions are the less necessary, owing to the power of reinstatement given by s. 83 of the old Party-walls Act, 1774 (*d*).

This section reduces the risk, as the insurance-money may, under the provisions of this Act, be intercepted, and a *malâ fide* insurance may thus become unavailing.

[* 112] *The valuation of the things insured is also material to the risk, as, if it is excessive, it affords the assured a prospect of gain by the perils. But it is less material in fire than in marine policies, as the policy is open and not valued, and valuation is not very important until after a loss (*d*).

What the fire risk taken covers.—What may or may not be included in a fire risk very much depends upon the terms of the policy and conditions. But the Courts have laid down certain rules as to the construction of such policies as have come before them, by the light of which subsequent policies have been drafted, and which will control all such instruments in the absence of contradictory or varying stipulations.

What word "fire" includes.—The word fire, in contracts of fire insurance, is taken in its ordinary signification. It is not confined to any technical and restricted meaning, which might be applied to it on a scientific analysis of its nature and properties, nor should it receive that general and extended signification which, by a kind of figure of speech, is sometimes applied to the term, but it should be construed in its ordinary, popular sense. Unless there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable; *e. g.*, where sugar was spoilt by greatheat through a register being closed, but there was no actual ignition, the company was held not liable (*e*). There must be actual ignition, and the loss must be the effect of such ignition. Not that the identical property to which the damage occurred should be ignited or consumed, but there must be a fire or burning, which is the proximate cause of the loss. It is immaterial how intense the heat may be; unless it be the effect of ignition, is not within the terms of the policy.

[* 113] The heat of the sun often contracts *timber, from which losses occur, but they would not be considered losses by fire unless there be ignition, and the destruction arose from actual fire (*f*).

The insurers agree to make good unto the assured all such loss or damage to the property as shall happen by fire. Thus far there is no limit to their undertaking.

Origin of fire does not matter.—If the loss happen by fire, unless there was fraud on the part of the assured, it matters not how the flame was kindled, whether it be the result of accident or design,

(*d*) 14 Geo. III. c. 78, and *vide infra*, cap. on Reinstatement.

(*d*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531, 43 L. J. Q. B 227, 30 L. T. N. S. 547, 22 W. R. 884. *Britton* v. *Royal*, 4 F. & F. 905, per Willes, J., 15 L. T. N. S. 72.

(*e*) *Austin* v. *Drewe*, 6 Taunt 436, 4 Camp. 360, Holt N. P. 126, Marsh 130, considered in *Scripture* v. *Lowell*, 74 Mass. (10 Cush) 356.

(*f*) *Babcock* v. *Montgomery Co.*, 6 Barb. (N. Y.) 637.

whether the torch be applied by the honest magistrate or the wicked incendiary, whether the purpose was to save the city as in New York, or the country as at Moscow, whether the fire be applied to gunpowder in the basement or by a burning shingle on the roof (*Hillier* v. *Alleghany*, 3 Penn. 472, per Grier, J.); and in Angell on Insurance it is said: "Fire produced by the friction of a wheel in its axle, which consumes the wheel, is a loss of the wheel by fire. The burning of a barrel or other vessel containing quicklime which is accidentally submitted to the action of water, is a loss by fire as to the vessel, but the spoiling of the lime is not such a loss. So the spoiling or consuming of any two chemical fluids by process of combustion is not a loss by fire as to either of the substances, but as to any third body it is such loss. Similarly, heat or fire produced by vegetable fermentation, as when a hayrick takes fire by its own heat, is not a loss by fire as to the vegetable collection, but as to surrounding bodies it is" (Angell 155).

Explosion.—Insurance against fire does not include damage by mere heat and smoke from the ordinary fireplaces if there has not been natural ignition (*g*); nor will it include damage by explosion, unless specially stipulated, *or there has been actually a fire within the building. On this ground the Courts refused to grant damages for injury to property by the explosion of the Erith Powder Mills in 1864 (*h*), holding that damage by atmospheric concussion by explosion caused by fire was too remote. Bramwell, B., explained fire as meaning either ignition of the article itself or a part of the premises where it is. [* 114]

Under this rule, damage by explosion within the house is not within the risk, even when it occurs in the course of a fire in the house, nor is the damage by such explosion part of the damage caused by the fire (*i*). But it is usual to insure specifically against explosion of gas in domestic use, and by the word "gas" coal-gas for lighting purposes is meant, though, scientifically speaking, innumerable other instances are of a gaseous nature (*k*).

Explosion—In America, where an insured building was blown down and the wind was alleged to have blown fire into contact with escaping gases, the insurer was held not liable, as the policy contained a condition against explosion unless fire ensued (*l*).

Gunpowder—In America gunpowder is held a fire risk (*m*), but

(*g*) *Austin* v. *Drew*, 6 Taunt. C. P. 436 (1816), 4 Camp. 360, Holt N. P. 126, 2 Marsh C. P. 130; and see *Scripture* v. *Lowell*, 74 Mass. 356.

(*h*) *Everett* v. *London Assurance*, 19 C. B. N. S 126, 11 Jur N. S. 546, 24 L. J. C. P. 299, 13 W. R. 862, 6 N. R. 234. In *Taunton* v. *The Royal*, 2 H & M. 135, 33 L J. Ch. 406, 10 L. T N. S. 156, 12 W. R. 549, it was held that a company could as a matter of business pay for loss by explosion not covered by policy if it seemed in interest of company.

(*i*) *Stanly* v. *Western*, L. R. 3 Ex. 71, 37 L. J. Ex. 78, 17 L. T. N. S. 513, 16 W. R. 369.

(*k*) *Stanley* v. *Western Insurance Co.*, *ubi sup.*

(*l*) *Transatlantic Fire* v. *Dorsey*, 40 Am. Rep. 403.

(*m*) *Waters* v. *Merchants*, 11 Peters (U. S.) 218.

in this country risk of explosion by gunpowder is expressly excluded in ordinary policies on house or furniture, and most if not all policies of insurance contain a condition that the policy is to be void if at any time there is more than a certain amount therein stated of gunpowder kept on the premises, unless special provision be made therein for the storing of a larger quantity.

[* 115] *Such a condition is not unreasonable, and breach thereof avoids the policy, and the condition is not discharged by specification in the policy of the stock-in-trade as including hazardous goods (*n*).

Though gunpowder was described in one condition indorsed on the policy as of the class hazardous, this condition could not be held to control the express limitation in another condition of the amount of gunpowder which the insurer would allow under the policy; and where a form of policy intended for houses and goods was granted to a vessel plying on the Canadian lakes and rivers, without striking out the conditions inapplicable to the vessel, but adding that the provisoes, &c., should take effect so far as applicable, the Privy Council held that the gunpowder condition applied and had been broken (*o*).

Loss. Proximate cause.—It must be shown, if required, that the loss was proximately and immediately (not remotely) caused by one of the perils insured against (*p*). Usually this is a question of inference from the facts proved at the trial, or interpretation of terms used in the policy (*q*).

Excessive application of heat in manufacturing.—Where the insurance is against fire, damage by excessive heat applied to manufacturing purposes, but without ignition, is not within the policy (*r*). Nor is damage by hot water a fire loss within a marine policy (*s*).

Lightning.—Even the danger of lightning is excluded

[* 116] from the fire *risk, unless it actually ignites the insured property or part thereof. Electricity is not fire in the popular sense, nor is damage caused by it necessarily damage by ignition. Policies usually give the assured notice that the insurers will not take the risk of damage by lightning unless it fires the subject-matter (*t*); and this not to contract themselves out of a Common Law

(*n*) *M'Ewan* v. *Guthridge*, 13 Moore P. C. 304, 8 W. R. 265.

(*o*) *Beacon* v. *Gibb*, 1 Moore P. C. N. S. 78, 9 Jur. N. S. 185, 77 L. T. N. S. 574, 11 W. R. 194.

(*p*) *Marsden* v. *City and County Assurance*, L. R. 1 C. P. 232, 35 L. J. C. P. 60, 14 W. R. 106 *Everett* v. *London Assurance*, 19 C. B. N. S. 126, 34 L. J. C. P. 299, 13 W. R 862, 11 Jur. N. S. 546, 6 N. R. 284.

(*q*) *New York Express Co.* v. *Traders' Insurance Co.*, 132 Mass. 337. *Insurance Co.* v. *Transportation Co.*, 12 Wallace (U. S.) 194.

(*r*) *Atkinson* v. *Newcastle Co.*, L. R. 6 Ex. 404, 2 Ex. D. 441.

(*s*) *Siordet* v. *Hall*, 4 Bling. 607 See *White* v. *Republic Co.*, 57 Maine 91. *Lewis* v. *Springfield Co.*, 76 Mass. (10 Gray) 159. *City Insurance Co.* v. *Corlies*, 21 Wend. (N. Y.) 367. *Case* v. *Hartford Co.*, 13 Illinois 676. *Witherell* v. *Maine Insurance Co.*, 49 Maine 200.

(*t*) *Everett* v *London Assurance*, 19 C. B. N. S. 126, 34 L. J C. P. 299, 13 W. R. 862, 11 Jur. N. S. 546.

liability (*u*) but simply to protect themselves against unfounded claims. In this, as in many cases, the policies merely bring to the notice of the assured the ordinary rules of insurance law. The practice, however, of insurance companies seems to be changing, and many companies now announce that they will take lightning risks, which, however, are found in practice to be infinitesimal.[1]

Negligence.—A fire risk covers on the negligence of the assured, his servants, and strangers (*x*). An insurance on goods carried by land will usually cover negligence of the carrier, his servants and agents; and risk of miscarriage generally (*y*). No wilful act of the insured is covered (*z*). But arson by a wife will not disentitle the husband from recovering if no crime be shown to have been committed by him (*a*).

Gross neglect has in America been held *quasi ex male-ficio*, and inconsistent with good faith (*b*).

**Risk from incendiary should be disclosed.*—Since fire poli- [*117] cies usually (*c*), but not always (*d*), cover risk of incendiarism, the existence of any circumstances making an applicant liable to have his property burnt may be material to be known by the insurer.

If a man has from his unpopularity, or from any other cause, good reason to fear that fire will be set to his premises, and he insures without mentioning the fact, his policy will be void for breach of good faith; for it is clear that an attempt or threat to set fire to property on which insurance is sought is a fact of great importance for the insurer's consideration, and presumptively always material to the risk (*e*).

So also *à fortiori* attempts made to burn the property must be disclosed (*f*) if recent enough to be in any way material.

(*u*) *Babcock* v. *Montgomery, &c., Co.*, 6 Barb. (N. Y.) 637 (1849), fully discusses the question as to lightning, and decides that destruction by lightning is not within a fire risk, unless there be ignition.

(*x*) *Busk* v. *Royal Exchange*. 2 B. & Ald. 73 *Gibson* v. *Small*, 4 H. L. C. 353. *Shaw* v. *Robberds*, 1 N. & P. 279, 287, 6 Ad. & E. 75, 6 L. J. N. S. K. B. 106. *Dobson* v. *Sotheby*, 1 Mood. & Mal. 90. *Austin* v. *Drew*, 6 Taunt. 436, 1 Holt N. P. 126, 4 Camp 360, 2 Marsh C. P. 130.

(*y*) *Boehm* v. *Combe*, 2 M. & S. 172. *Columbia Co.* v. *Lawrence*, 10 Peters (U. S.) 507. *Phœnix Insurance Co.* v. *Erie and Western, &c., Co.*, 10 Davis (Sup. Ct. U. S.) 312.

(*z*) *Thurtell* v. *Beaumont*, 1 Bling. 339, 8 Moore C. P. 612, 2 L. J. C. P. 4.

(*a*) *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561, 50 L. J. Q. B. 329, 45 L. T. N. S. 411, 29 W. R. 850.

(*b*) *Fletcher* v. *Commonwealth*, 35 Mass. (8 Pickering) 421. *Cf.* Dalloz Jurisp. gén., 1868, p. 29.

(*c*) *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561, 50 L. J. Q. B. 329, 45 L. T. N. S. 411, 29 W. R. 850.

(*d*) *Gorman* v. *Hand-in-Hand*, 1 R. 11 C. L. 224.

(*e*) *Watt* v. *Union Ins. Co.*, 5 N. S. W. Law 48. *North American Fire* v. *Throop*, 23 Mich. 167, 7 Am. Rep. 638. *Walden* v. *Louisiana, &c., Co.*, 12 Louis. O. S. 134.

(*f*) *Beebee* v. *Hartford County Insurance Co*, 25 Conn. 51.

[1] *Haws* vs. *Philada. Fire Asso*, 114 Pa. St. 431. *Boright* v. *Springfield F. & M. Ins. Co.*, 34 Minn. 352.

Neighbour's danger material.—So also if a neighbour of the assured is threatened with an incendiary fire, and the adjacency of the tenements makes risk to him risk to the applicant (*g*). This would appear to follow from the general rule that material facts must be disclosed unasked (*h*).

Threat during popular excitement.—But if the threat be merely one made in time of popular excitement, which has subsided some time before application for insurance, there will no need to mention it (*i*).

Question as to threats.—Where the insurer asks in the ap-
[* 118] plication form *whether the applicant has any reason to fear an incendiary fire, the question must be truly answered or the policy will be void. If threats have been made, he must disclose them under such a question, which goes to facts rather than his impressions.

Reasonable fear.—What a man has reason to fear must be determined by considering what a reasonably prudent man, not an extremely timid or suspicious man, would consider gave him some reason for believing in the existence of danger. He may not be bound to mention every idle rumour (*k*), but the smallest measure of duty imposed upon him is to disclose what would seem to a reasonably prudent man to imply some risk. *Care by assured not alter duty to disclose.*—The duty to answer such questions by stating threats made is not altered by their having induced the applicant to take additional care (*l*).

And to the question, "Is any incendiary danger apprehended or threatened?" a negative answer would in the same circumstances be untrue (*m*).

Evidence of fear.—Where a man to such a question answers "No," while he is at the very moment showing his direct dread of an incendiary fire by watching against it and seeking insurance, such acts are strong evidence that he had reason to fear such fire (*n*).

Onus of proof on insurer.—Even where incendiary fires are excepted from a risk, the onus of proof that the fire was deliberately caused lies on the insurers; and if the evidence leaves it doubtful whether the fire was caused by accident of design, the judge is right in refusing to direct a verdict for the insurers (*o*).

(*g*) *Ch. Bufe* v. *Turner*, 6 Taunt. 338.

(*h*) *Lindenau* v. *Desborough*, 8 B. & C. 586. *Carter* v. *Boehm*, 3 Burr. 1905.

(*i*) *Kelly* v. *Hochelaga Co*, 24 Lr. Can. Jur. 298. *Goodwin* v. *Lancashire Fire Co*, 18 Lr. Can. Jur. 1. See *Pim* v. *Reid*, 6 M. & G. 10, 12 L. J. C. P. 299. *Curry* v. *Commonwealth*, 27 Mass. (10 Pickering) 535.

(*k*) *New York Bowery Co.* v. *New York Fire*, 17 Wend. (N. Y.) 359, 381

(*l*) Per Moss, C. J, in *Greet* v. *Citizens' Insurance Co.*, 5 U. C. (App.) 596, 601.

(*m*) *Herbert* v. *Mercantile Fire Co.*, 43 U. C. (Q. B.) 384. *Greet* v. *Citizens' Insurance Co.*, 5 U. C. (App.) 596.

(*n*) *Campbell* v. *Victoria Mutual Fire Ins. Co.*, 45 U. C. (Q. B) 412.

(*o*) *Gorman* v. *Hand-in-Hand*, I R. 11 C. L. 224. *Watt* v. *Union Ins. Co.*, 5 N. S. W. Law 106.

Assignment of policy. Arson by assignor.—If a man takes [*119] an assignment of a policy, he does so subject to all the rights, &c., operative against the assignor (*o*); and if the assignor burns the place down, the assignee cannot recover. This has been decided in Canada as to a mortgage by assignment. The consent of the insurers to the assignment will not help the assignee, as it does not create a new contract (*p*).

Of course a mortgagee's policy, effected by him at his own cost on his mortgage interest only, would not be affected by arson of the mortgagor.

Arson by wife or relative of assured no defence to insurer—Where a fire is caused on insured premises by the wilful act of a third person, to which the insured is in no way privy, however near the relationship of the offender to the insured, the insurer is liable (*q*). Even if the premises insured are set on fire by the wife of the assured, the insurer has no defence. The doctrine of agency as between husband and wife does not extend to crimes (*r*).

Arson must be proved as upon an indictment.—If the assured himself fired the premises, or the fire be by his procurement, of course he cannot recover; but if the defence of arson be raised, such evidence must be adduced in support thereof as would be required to convict the assured upon an indictment for arson, and the jury must be as fully satisfied that the crime charged is made out as would warrant their finding him guilty on such an indictment. This is the rule in Great Britain, followed in Canada (*s*). The *American Courts incline to hold that evidence not strong [*120] enough to support a conviction for arson would be strong enough to defeat the claim of the assured (*t*).

Fire risk, what included in. Fire occasioned by an act done in duty to the State.—It was said by Lord Ellenborough in an insurance case, "If the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident or by lightning, or by an act done in duty to the State" (*u*); and it has been held that if a ship is burnt without any fault in the master, from an apprehension that she has the plague on board, and to prevent the

(*o*) *Rhodes* v *Union Ins. Co.*, 2 N. Z. (Sup. Ct.) 106.

(*p*) *Chisholm* v. *Provincial Insurance Co.*, 20 U. C. (C. P.) 11. For a mode of avoiding this danger to mortagees, see *Howes* v. *Dominion Fire Co.*, 8 Ontario (App.) 644.

(*q*) *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561, 50 L. J. Q. B. 329, 45 L. T. N. S 411, 29 W. R. 850. *Schmidt* v. *New York Union Mutual*, 67 Mass. (1 Gray) 529.

(*r*) *Midland Insurance Co.* v. *Smith*, *supra*. *Gove* v. *Farmers' Mutual Fire Insurance*, 48 N. H. 41.

(*s*) *Thurtell* v. *Beaumont*, 8 Moore C. P. 612, 1 Bing. 339, 2 L J. C. P. 4. *Britton* v. *Royal*, 15 L. T. N. S. 73, 4 F. & F. 905. *Hercules* v. *Hunter*, 15 C. S. C. (1st series) 800. *Lambkin* v. *Ontario Mutual Fire*, 12 U. C. (Q. B.) 578 (1855).

(*t*) *Scott* v. *Home*, 1 Dillon (C. Ct. U. S.) 105, and see May 889 (2nd ed.) and Sansum Ins. Dig. pp. 148-150.

(*u*) *Gordon* v. *Remmington*, 1 Camp. 123. Pothier, par Dupin, vol. 4, p. 457 s. 53.

infection from spreading, the assured is entitled to recover (*x*), and this doctrine applies equally to fire risks upon land.

Damage whilst extinguishing fire.—Where a fire has actually occurred, it must be the proximate cause of the loss or damage to bring it within the policy, but damage resulting from an apparently necessary and *bonâ fide* effort to put out a fire, whether by spoiling goods with water or throwing furniture out of window, or blowing up a neighbouring house to arrest the course of the fire, or any loss directly resulting from the fire, will be treated as within the risk (*y*).

Damage by fire brigade.—Within the Metropolitan district any damage done by the fire brigade, in due execution of its duties, is to be treated as damage by fire within the meaning of any policy against fire (*z*).

So that where an officer of the brigade finds it necessary to occupy or destroy a neighbouring house so as to stop the
[*121] spread of a fire, and furniture is damaged by the *brigade removing it for such purposes, the insurer is liable.

Damage by water to others than insured.—When one part of a house occupied by one tenant catches fire, damage done to the property of another tenant by water in the effort to put out the fire is within fire policy on the goods of the second (*a*).

Destruction of property by municipal authorities.—Where municipal authorities blow up houses to stay the progress of a fire, the insurers will, it seems, be liable for the damage caused, quite irrespective of provisions in local Acts.

1. If the authorities act illegally, it is not a case of "usurped power" (*b*), but a mere excessive exercise of jurisdiction.

2. If they act legally, the question of usurped power cannot arise, and even if by their act they render the corporation or authorities liable in damages, this will be no defence to the insurers to a claim on the policy.

3. Where the loss is due to fire, it does not seem to matter whether it be the result of accident or design the act of a magistrate or an incendiary (*c*).

There is no public statute on the subject of the destruction of buildings by municipal authorities applicable to other places than the metropolis, and reference must therefore be made to local Improvement Acts in such cases.

Damage by removal when within the policy.—It seems that bare ap-

(*x*) Emerigon, tom. 1, p. 434.

(*y*) *Stanley* v. *Western*, 37 L. J. Q. B. at 75, per Kelly, C. B., L. R. 3 Ex. 71, 17 L. T. N. S. 513, 16 W. R. 369. *Babcock* v. *Montgomery*, 6 Barb. (N. Y.) 637.

(*z*) 28 & 29 Vict. c. 90, s. 12.

(*a*) *Geiseck* v. *Crescent Mutual*, 19 Louis. Ann. 297 (1867).

(*b*) Defined in *Drinkwater* v. *London Assurance*, 2 Wilson 363, per Bathurst, J. (1767).

(*c*) 1836, *City Fire Insurance Co.* v. *Corlies*, 21 Wend. (N. Y.) 367.

prehension that a fire (*d*) will spread to his house will not justify (*e*) the assured in moving his goods and claiming the damage caused by *so doing from the insurer. But if the [* 122] danger is immediate, he would be justified (*f*), and by damage occurring in the process would fall on the insurers; and in this case Kelly, C. B,, said: "Any loss resulting from an apparently necessary and *bonâ fide* effort to put out a fire, whether it be by spoiling the goods by water or throwing the articles of furniture out of the window, or even the destroying of a neighboring house by an explosion for the purpose of checking the progress of the flames —in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy."

Fire, what within risk. Removal of goods when not covered.—Insurers being only answerable for direct and immediate, not for consequential and remote, losses from the perils insured against, when that is fire, the instrument of destruction must be fire, and therefore in an American case (*g*), where the goods insured and the house which contained them were not touched by the fire, but the goods were damaged in the removal of them under an apprehension that they would be reached by the flames which had caught one of the houses of the same block, it was held that the injury sustained by the assured in the removal of his goods was not a loss which was covered by his policy against the peril of fire. The assured insured not against apprehensions of fire, and the injury sustained originated not from necessity to save him from impending fire, but from an anticipation of damage from it (*h*).

Assured must try to save property.—When his house takes fire, the assured must use reasonable efforts to save his goods (*i*). He is not entitled to look on and let them burn because he is insured. His *loss would in such a case be to such an extent [* 123] the direct consequences of his own act.

Sometimes a fire policy contains a provision that the insured shall use all diligence to preserve the property in case of fire; but, irrespective of its presence or absence, it seems to be certain that the assured is entitled to be reimbursed rateably, if not wholly, for the cost of an effort to save the property (*k*) from the risk insured against, and the act of removal in such a case is not an alteration of the risk, but an attempt to avoid it (*l*).

(*d*) 28 & 29 Vict. c. 90, s. 12.

(*e*) *Holtzman* v. *Franklin Fire*, 4 Cranch (C. Ct U. S.) 295. *Hillier* v. *Allegheny County*, 3 Penn. 470.

(*f*) *Stanley* v. *Western*, L. R. 3 Ex. 74, 37 L. J. Ex. 73, 17 L. T. N. S 513, 16 W. R. 369, per Kelly, C. B.

(*g*) *Hillier* v. *Alleghany Ins. Co.*, 3 Penn. 470.

(*h*) *M'Gibbon* v. *Queen Ins. Co.*, 10 Lr. Can. Jur. 227.

(*i*) *Levy* v. *Baillie*, 7 Bling. 349, seems the only English case on loss by removal, but there fraud was alleged.

(*k*) *Thompson* v. *Montreal*, 6 U. C. (Q. B.) 319. *Talamon* v. *Home and Citizens*, 16 Louis. Ann. 426, and per Kelly, C. B , in *Stanley* v. *Western*, L. R. 3 Ex. 74, *supra*.

(*l*) *White* v. *Republic Co.*, 57 Maine 91. *Case* v. *Hartford*, 13 Illinois 676.

Removal. Damage. Criterion of insurer's liability. Rule in America.—If the danger is such that a prudent uninsured man would not let his goods remain in the building threatened, and if the assured uses the same care as would be exercised by a prudent uninsured man in the removal of the goods, he will be entitled to recover from the insurer all damage done in removing them (*m*).

Injuries to goods by wet or in any manner from the exposure during the confusion, &c., of a fire, and during removal, before they can be got to a place of safety, and goods lost or stolen during the confusion of a fire, are within the policy (*n*).

Theft during fire.—In Canada the loss of goods by theft during a fire is held within the risk, and the grounds for holding the insurers liable are well stated as follows:—If insurers are to be considered clear the instant the effects insured are beyond the reach of the flames, whether afterwards unavoidably lost to the assured or not, then the latter might be disposed to say: "Whilst my effects remain in my house they are at the risk of the insurers, [* 124] whereas if I put them into the street they will *be at my risk; I therefore will prevent their removal until at any rate I can have due precautions taken for their preservation out of doors." Moreover, when a house is found to be on fire, strangers are let in to assist in extinguishing the flames and in saving the goods. It is for the interest of the insurers that this should be done, and losses resulting from a proceeding adopted mainly for their benefit ought not to fall on the assured (*o*).

Their liability for goods stolen during a fire does not seem to have been questioned by insurers in this country. In *Levy* v. *Baillee* (*p*), where a claim of £1000 for goods stolen was made, it was resisted only on the ground of fraud. The rule of marine insurance seems to be followed.

Marine rule in case of theft.—Marine policies expressly except against the risk of loss by thieves; but when a ship is run ashore owing to a fire and goods landed therefrom are subsequently plundered or destroyed by landsmen, and never come again to the hands of the owners, it is a loss by the perils of the sea (*q*). In the same way it would seem that losses of this character consequent on a fire follow from the happening of the peril insured against.

Insurers can, of course, and sometimes do, exclude all liability for loss by theft during a fire (*r*).

(*m*) *Holtzman* v. *Franklin Fire*, 4 Cranch (C Ct. U. S.) 295.

(*n*) 1850, *Thompson* v. *Montreal*, 6 U. C (Q. B.) 319, per Robinson, C. J.

(*o*) *M'Gibbon* v. *Queen*, 10 Lr. Can. Jur. 227. *Harris* v. *London and Lancashire*, 10 Lr. Can. Jur. 269.

(*p*) 7 Bing. 349. *M'Gibbon* v. *Queen Insurance*, 10 Lr. Can. Jur. 227 and cases already cited.

(*q*) *Bondrett* v. *Hentigg*, Holt N. P. 149, per Gibbs, C. J. Pothier, tom. 5, 265.

(*r*) *Webb* v. *Protection Co.*, 14 Missouri 8.

Sue and labour clause.—The sue and labour clause (*s*) in marine policies is occasionally introduced into fire policies (*t*). It has *nothing to do with salvage in the ordinary sense of the [* 125] word, since salvors have a lien on things saved and no other claim whatever (*u*), and the sue and labour clause would justify claim for money paid and work and labour done to save the insured goods, even if nothing were saved. *Cost of an effort to save, on whom it falls.*—The aim of the clause is to induce the assured to do all he can to save the insured property by promising to recoup him for expense reasonably incurred for the preservation of the thing insured from loss in consequence of the efforts of the insured and his agents (*x*).

In what share cost borne.—The condition in *Thompson* v. *Montreal Company* (*y*) was that in case of removal to escape conflagration the insurer would contribute rateably with the assured and other insurers to the loss and expenses "attending the act of salvage." Of this clause, Robinson, C. J., there said: "That clause was surely not intended to deprive the assured of any portion of his claim under the general terms of his policy, but is a condition wholly for his advantage, and intended to afford him a remedy for something in addition to the compensation for his goods destroyed, injured, or lost in consequence of the fire. The object of it is no doubt to encourage the assured to make every exertion to save his goods by holding him out the advantage of being proportionably reimbursed for the expenses which he may incur. Thus if he is insured for £2000 in one office, and for £1000 in another on goods worth £5000, and to avoid damage of an imminent fire he removes all his goods, as it turns out, in safety, the two insurers would between them contribute three-fifths of the cost of removal (*z*).

The law laid down in this case as to a fire insurance [126] seems quite in accordance with the view of Lord Blackburn in *Aitcheson* v. *Lohre* (*a*) as to the effect of the sue and labour clause. Hence it could never be contended by an insurer that if nothing was saved by such removal he would not be liable for the cost of an effort to save it in addition to the amount of the policy, when a clause such as that above mentioned was inserted in the policy as an inducement to salvage.

When removal no risk.—But these rules do not of course apply to

(*s*) *Kidston* v. *Empire Insurance Co.*, L. R. 1 C. P. 535, 35 L. J. C. P. 250, 15 L. T. N. S. 12.

(*t*) *Thompson* v. *Montreal*, 6 U. C. (Q. B.) 319.

(*u*) *Aitchison* v. *Lohre*, 4 App. Cas. at 746, per Lord Blackburn. Reported also 49 L. J. Q. B. 123, 41 L. T. N. S. 323, 28 W. R. 1. See *Forwood* v. *North Wales Mutual*, 5 Q. B. D. 57, in case of partial loss, 49 L. J. C. P. 593, 42 L. T. N. S. 837.

(*x*) *Aitchison* v. *Lohre*, 4 App. Cas 765. *Thompson* v. *Montreal*, 6 U. C (Q. B.) 319.

(*y*) 6 U. C. (Q. B.) 319.

(*z*) *Thompson* v. *Montreal*, 6 U. C. (Q. B.) 319 (1850).

(*a*) 4 App. Cas. 764.

removal when the assured is changing his home or his place of business.

Consent of insurer to removal necessary.—In such cases the consent of the insurer is always necessary, since the risk is presumably altered, and must be testified in the manner stipulated for in the policy or prescribed by the charter or other instrument or by the statute constituting the insurance corporation. It need not be in writing, unless so stipulated or prescribed. The usual condition is that the insurers' assent shall be evidenced only by written endorsement on the policy. They are not under any obligation to assent, and, if a fire happens before their assent is endorsed, there is no means of making them pay for it (*b*).

Goods not protected in transitu.—Even where consent has been obtained, the risk is not transferred till the goods are removed, and they are not covered in the process of removal, being then neither in the old nor in the new place (*c*); for the assent does not turn the policy *pro tempore* into a voyage policy, and the risk of removal is on the assured or his carrier according to the terms of the contract of carriage.

No protection until complete removal.—Only one risk is [* 127] contemplated, except by special *stipulation. So assent to transfer will not amount to a contract to cover goods in both places until goods to the full amount insured have been removed (*d*).

On this it may be observed—

M'Clure v. *Lancashire discussed.*—1. That if the removal is not completed and the risk is of the same character in both places, the insurers, by their assent to the transfer, relieve themselves from liability as to either the part transferred or that which is untransferred, though it would seem that the very object of their assent was to continue their liability in such an event.

2. That though to hold otherwise would be to make the insurers liable to a risk in two places, the risk would be of the same character in each place, and the policy would only be divided into two smaller policies at the same rate on like risks; and if the liability were held to exist in both places it would work no unfairness, since it would cover goods on their arrival at the new place, and until goods to the value within the policy had there arrived would continue on goods in the old place to an amount equal to the balance not at risk in the new place.

3. That it was enough in *M'Clure's Case*, for the purpose of the decision, to say that goods to the full value covered by the policy had been transferred.

Sometimes policies are issued covering property not only in

(*b*) *Noad* v. *Provincial, &c., Co.*, 18 U. C. (Q. B.) 584.
(*c*) *Kunzze* v. *American Exchange Fire*, 41 N. Y. (2 Hand.) 412. *White* v. *Republic*, 57 Maine 91, 2 Am. Rep. 22.
(*d*) *M'Clure* v. *Lancashire*, 6 Ir. Jur. N. S. 68.

warehouses, but in transit through the streets, within limits defined or undefined (*e*).

American case. Wearing apparel.—A policy on the goods in a dwelling-house, and covering wearing apparel, has been held in Iowa to protect the assured against loss by its destruction or injury *whilst it is being worn (*f*). This, however, would [*128] seem to be wrong, because the risk accepted under a fire policy is essentially local, and depends upon the structure and conditions of the building in which the goods insured are contained (*g*).

Horses, &c.—It has also been held in America that description of horses, or stock or vehicles (*h*), as kept in a certain place, does not preclude from recovery if they are injured elsewhere, by a risk insured against.

Chattels outside place where insured not covered.—It has been held in Ireland that when locomotive chattels, such as agricultural implements, carts, &c., are insured in a certain place the owner cannot recover for them, if they are burnt outside the limits of the place named (*i*). They are insured only whilst in the specified place, and while out in the fields or elsewhere are at owner's risk. But on return to the specified place the risk re-attaches.

Place not mentioned, goods protected anywhere.—But an insurance on such, generally without mention of place, would cover them wherever burnt.

Removal of property insured.—The American Courts seem to a certain extent at variance with each other on the subject of removal. The rule generally adopted is this: "Temporary removal of property, occasional or habitual, in pursuance of a use which is a certain necessary consequence arising from the character of the property, without any change in the ordinary place of keeping, will be no defence to an action on the policy" (*k*).

In view of this, the words "contained in" have *been in- [*129] terpreted with reference to the nature of the property to which they are applied; and it has been held that a carriage insured, as contained in a certain stable, but burnt while away for repairs, was at insurer's risk (*l*).

(*e*) *Fairchild* v. *Liverpool and London*, 51 N. Y. 65. *Merrick* v. *Germania*, 54 Penn. St. 27.

(*f*) *Langueville* v. *Western Insurance Co.*, 51 Iowa 583 (1879), 33 Am. Rep. 146. *Noyes* v. *North-Western Ins. Co.*, 54 Am. Rep 631.

(*g*) *Pearson* v. *Commercial Union*, 1 App. Cas. 505, 45 L. J. C. P. 761, 36 L. T. N. S. 445, 24 W. R. 951, and per Cooley, C. J., in *English* v. *Franklin Fire Co.*, 54 Am. Rep. 377.

(*h*) *M'Clure* v. *Gerard Fire and Marine*, 43 Iowa 349, 22 Am. Rep. 249, and cases there cited.

(*i*) *Gorman* v. *Hand-in-Hand*, I. R. 11 C. L 224.

(*k*) *Lyons* v. *Providence Washington Co.*, 43 A. M. Rep. 34 note.

(*l*) See *London and Lancashire Co.* v. *Graves* 43 Am. Rep. 34 note, and other cases there cited See also *Pearson* v. *Commercial Union*, *ubi supra*. *Noyes* v. *North-Western Ins. Co.*, 54 Am. Rep. 631.

To what extent the risk is taken.—The liability of the insurer is limited to the amount for which the premium is paid, but the obligation incurred is not to pay the whole sum, but only the damage done by the peril insured against, not exceeding the sum insured. The insurer, if property is under-insured, cannot, independently of special agreement, insist on paying only a sum bearing the same ratio to the damage as the amount insured bears to the full value of the property insured (*m*). This would be penalizing a man for under-insurance.

Proportion payable where under-insurance.—Where, however, by a fire policy £500 was insured on twelve months' rent of buildings, such insurance to cover the rent of the buildings from the time of fire until reinstatement, and in the proportion which the period of untenantableness should bear to the term of rent insured not exceeding twelve months' rent, and the buildings were damaged by fire and remained untenantable for some months, it was held by the Court of Session in Scotland (*dubitante* Lord Rutherford Clarke) that the insured could only recover an amount bearing the same proportion to £500 as the period of untenantableness bore to twelve months (*n*).

Voluntary self-destruction, and death as the result of crime.—The insurer may take a risk of death by any cause other than by sentence of law, self-destruction in a sane mind, or the consequences of some criminal violation of law. If death ensue from any of these [*130] *causes, the insurer is not liable, since it is contrary to the policy of the law, in such case, to allow the insurance money to be recovered (*o*). Thus, it has been held that where death resulted from an operation unlawfully performed to procure abortion the insurers were not liable (*p*). And the same has been held in America where the assured was accidentally killed in a *mêlée* caused by his assaulting another person (*q*).[3] There must be some relation between the violation of law and the death to make good the insurer's defence, *i. e.*, the death must be directly connected with the criminal act (*r*). Under this principle will fall the cases just mentioned, and also death by duelling (*s*), in a prize fight (*t*), or any unlawful sport (*u*).

(*m*) *Thompson* v. *Montreal, &c., Co.*, 6 U. C. (Q. B.) 319.

(*n*) *Buchanan* v. *Liverpool, London, and Globe*, 11 C. S. C. (4th series) 1032, 21 Sc. L. R. 696.

(*o*) *Amicable* v. *Bolland*, 2 Dow & Cl. 1, 4 Bligh N. S. 194, per Brougham C., reversing *Bolland* v. *Disney*, 3 Russ. 351.

(*p*) *Horn* v. *Anglo-Australian*, 30 L. J. Ch. 511. 4 L. T. N. S. 143, 9 W. R. 359, 7 Jur. N. S. 673. *Hatch* v. *Mutual Beneficial Life*, 21 Am. Rep. 541. *Bradley* v. *Beneficial Life*, 6 Am. Rep. 115, 45 N. Y. 422.

(*q*) *Murray* v. *New York Co*, 48 Am Rep. 658.

(*r*) *Bradley* v. *Mutual Co*, 45 N. Y. 422.

(*s*) Per Tindal, C J., *Borrodaile* v. *Hunter*, 5 Scott N. R. 418, 12 L. J. C. P. 225, 5 M. & S. 639, 7 Jur. 443.

(*t*) *Murray* v. *New York Co.*, 96 N Y. 614, 48 Am. Rep. 661.

(*u*) *Travellers Co.* v. *Seavers*, 19 Wallace (U. S.) 531.

Where a policy contained a proviso that in case the assured should die by his own hands, or by the hands of justice, the policy should be void, the assured threw himself into the Thames and was drowned; and the jury having found that he did so voluntary, knowing that he should destroy his life, but without being able to judge between right and wrong, it was held that the policy was avoided, as the proviso included all acts of voluntary self-destruction (*x*).

Suicide.—In *Borrodaile* v. *Hunter*, Erskine, J., said that to come within the proviso the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason *to understand the physical [*131] nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.

Suicide while insane.—Where, however, there is no provision in the policy that it should be void if the party whose life is insured should die by his own hands, &c., the policy will not be avoided by his destroying himself while in a state of mental derangement (*s*).

Life taken by assured.—If the life on which the policy is granted be taken by the person who would otherwise receive the insurance-money, insurers are discharged, and the money cannot be recovered from them (*t*).

Insurance by Friendly Society.—Elaborate precautions are taken in the Friendly Societies Act, 1875, to prevent child-murder with a view to the profit to be made out of the burial club payments (*u*).

(*x*) *Borrodaile* v. *Hunter*, 5 M. & G. 639, 7 Jur. 443, 5 Scott N. R. 418, 12 L. J. C. P. 225. *Stormont* v. *Watterloo, &c., Co.*, 1 F. & F. 22. *Schultze* v. *Insurance Co.*, 48 Am. Rep. 676.

(*s*) *Horn* v. *Anglo-Australian Insurance Co.*, 4 L. T. N. S. 142, 30 L. J. N. S. Ch. 511, 9 W R. 359, 7 Jur. N. S. 673. *Brestead* v. *Farmers*, 8 N. Y. 299. *Dufaur* v. *Professional Life Assurance Co.*, 25 Beav. 602, 27 L. J. Ch. 817, 32 L. T. 25, 4 Jur. N. S. 841. *Vyse* v. *Wakefield*, 6 M. & W. 443. *Moore* v. *Woolsey*, 4 Ell. & B. 243, 24 L. J. Q. B. 40, 24 L. T. 155, 3 W. R. 66, 1 Jur. N. S. 468. *Pritchard* v. *Merchants' and Tradesmen's Life Insurance Co.*, 27 L. J. C. P. 169, 3 C. B. N. S 622, 30 L. T 318, 6 W. R. 340, 4 Jur. N. S. 807. *Wainwright* v. *Bland*, 1 Moo. & Rob. 480, 1 M. & W. 32, 5 L J N S. Ex. 147. *Manhattan Life Co.* v. *Broughton*, 109 U. S. (2 Davis) 126, where the authorities, English and American, are discussed.

(*t*) *Prince of Wales Insurance Co.* v. *Palmer*, 25 Beav. 605; but see *Armstrong* v. *Mutual Life*, 20 Blatch. (U. S.) 493.

(*u*) Thus a conviction for not properly tending children and giving them improper and insufficient nourishment would probably debar from recovery of the burial club provision.

[3] A., by a show of force and threats to rob obtained a sum of money from a public building, and was shot and killed while escaping. Held, that he did not "die while violating any law" within the meaning of a clause in an insurance policy on his life. *Griffin* v *Western Mut. Benevolent Assn.*, 20 Neb. 620.

The total amount payable on the death of a child under
[* 132] five from however many insuring societies may *not exceed £6, and of a child between five and ten may not exceed £10 (x).

The insurance money is payable (under penalty) only—

(1) To the parent or personal representative of the parent.

(2) On production of a certificate of death written upon and marked in a particular way by the registrar so as to confine its use to an insurance society (y).

The registrar may not grant a certificate to obtain an amount in excess of that above limited, nor without a certificate as to the cause of death from a coroner or registered medical man, and the insuring societies are bound to inquire whether any and what sums of money have been paid on the same death by other societies.

Children over ten are not protected by the Act. And its provisions appear inadequate for the purposes for which they were intended. It seems desirable that some change should be made, casting upon the insurers the duty of paying the funeral expenses and no more. If this were done, the prospect of profit which now leads to the crime of child murder would be taken away.

Meaning of "commit suicide."—The words "commit suicide" have been held to include all acts of voluntary destruction, whatever the state of mind of the assured (z).[4] But these cases turn on the interpretation of express words, by which the insurer seeks to limit the risk which he will take, and he is the sole judge of what risk he will take (a). If the word suicide be used, but the act causing death be not voluntary, and the assured did not know
[* 133] *what he was doing, the act is within the risk (b). If nothing is said in the policy about suicide, the insurer is liable, unless *felo de se* is proved (c). Proof lies on the insurer, and, if the death is explicable in two ways, the presumption is against suicide (d). *American view.*—But if it is clear that a man died by his own hands, the American Courts, though they follow Tindal, C. J. (e), in his opinion that dying by his own hands and suicide are synonymous terms, hold that the policy will be void unless the

(x) 38 & 39 Vict. c. 60, s. 28 (1).

(y) 38 & 39 Vict. c. 60, s. 28 (2).

(z) *Clift* v. *Schwabe*, 3 C. B 437, 2 C. & K. 134, 17 L. J. C. P. 2, 7 L. T. 342.

(a) *Borrodaile* v. *Hunter*, 5 M. & G. 639, 12 L J. C. P. 225, 7 Jur. 443, 5 Scott N. R. 418, per Maule, J. *Cooper* v. *Massachusetts*, 3 Am. Rep. 451 and notes.

(b) *Stormont* v. *Waterloo Co.*, 1 F. & F. 22.

(c) *Horn* v. *Anglo-Australian*, 30 L. J. Ch. 511, 4 L. T. N. S. 143, 9 W. R. 359, 7 Jur. N. S. 673. *Dufaur* v. *Professional Life Co.*, 25 Beav. 602, 27 L. J. Ch. 817, 32 L. T. 25, 4 Jur. N. S. 841.

(d) *Mallory* v. *Travellers Co.*, 7 Am. Rep. 410, 47 N. Y. 552.

(e) *Borrodaile* v. *Hunter*, *ubi sup.*

[4] The insured hung himself while insane. Company held liable. *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527. During dementia, induced by softening of the brain, insured shot himself. Company held liable. *Keels* v. *Mutual Reserve Fund Assn.*, 29 Fea. Rep. 198.

deceased was so insane as to be unconscious that the act he was doing would cause his death, or unless he committed it under the influence of some insane and irresistible impulse (*f*). Some policies are drawn to exclude risk of suicide whatever the state of the man's mind, without considering the question of his responsibility (*g*). In others provision is made for return of premiums in case of suicide (*h*).

Volunteer and assignee in bankruptcy can't recover where suicide.—Where a contract of insurance is held void on grounds of public policy, as, for example, in a case of *felo de se*, neither the assignee under a voluntary assignment, nor the assignee in bankruptcy of the assured, can recover thereon (*i*).

Usual condition in case of suicide whilst insane.—Policies usually provide that in cases of suicide during insanity the policy shall not be paid in full but treated as surrendered, and the surrender value thereof paid to the personal representatives or other beneficiaries named therein. By this means substantial justice is *done (and all possible motive for suicide as a means of [*134] provision for one's family removed (*j*)), since the insurer avoids having his risk increased by the acceleration of death in such a manner by treating such an event as resignation of the utmost benefit derivable from the policy, and the representatives of the assured and his estate are not deprived of the benefit of the policy so far as it was earned by payment of premiums.

Clause that assignment for value not avoided by suicide of assignor.—Policies generally contain another clause avoiding them "if the life assured die by his own hands, the hands of justice, by duelling, or by suicide; but if any third party have acquired a *bonâ fide* interest therein, by assignment or by legal or equitable lien for a valuable consideration, or as security for money, the insurance thereby effected shall nevertheless be valid and of full effect." The expression "any third party" will not be construed to mean a person who, by operation of law, becomes the assignee of the estate of the man whose life is insured as a mere personal or legal representative to collect and administer the estate. He is not a third party in the true sense of the term. He is a person invested with certain powers to distribute the estate according to justice and equity; even if he be a third party he is not one who has the policy vested in him for a valuable consideration (*k*). *Reason for clause.*—

(*f*) *Van Zandt* v. *Mutual Ben. Life*, 14 Am. Rep. 245. *Brestead* v. *Farmers*, 8 N. Y. 299, discussing all English cases to 1853, approved in *Manhattan Co.* v. *Broughton*, 109 U. S. (2 Davis) 121.

(*g*) *Bigelow* v. *Berkshire*, 19 Am. Rep. 628 n., 93 U. S. (3 Otto) 284.

(*h*) *Stormont* v. *Waterloo Co.*, 1 F. & F. 22.

(*i*) *Amicable* v. *Bolland*, 4 Bligh N S. 194, 2 Dow & Cl. 1. But see *Moore* v. *Woolsey*, 4 E. & B. 243, 24 L. J. Q B. 40, 1 Jur. N. S. 468, 24 L. T. 155, 3 W. R 66.

(*j*) *Lotinga* v. *Commercial Union Ins. Co.*, *vide* the *Times*, 5 Dec. 1884.

(*k*) *Jackson* v. *Forster*, 29 L. J. Q B. 8 per Cockburn, C. J., 1 E. & E. 468, 33 L T. 290, 7 W. R 202, 578. *Moore* v. *Woolsey*, 4 E. & B. 243, 24 L. J. Q. B. 40, 1 Jur. N. S. 468, 24 L. T. 155, 3 W. R. 66.

In this case Cockburn, C. J., said: "I think it may be safely taken for granted that the reason why insurance companies on insuring a life provide that in the event of the violent death of the person assured, by his own hands or by the hands of an executioner, they shall not be obliged to pay, is that they insure upon the calculation of the average duration of human life. Were it not for this clause a party might insure for the benefit of those who are to [*135] come after him, intending all the *time to put an end to his life (*l*). On the other hand, if policies were liable to be defeated by such a death under every state of things, one great inducement to persons to insure, namely, the possibility of disposing of their policies, if expedient, would be taken away. Therefore a sort of compromise has been made. The company protect themselves against any such abridgment of life; but they say if the policy has been parted with for a valuable consideration, the forfeiture shall not take effect" (*m*). *Loan by company to assured. Policy containing such clause.*—If the policy contain such a clause, and the assured borrows money of the company on mortgage of other property and deposits the policy as collateral security, and subsequently commits suicide under temporary insanity, the company and the assured will stand in the same position as if the policy were mortgaged to a third person, and therefore the company will come within the exception in the clause, and the policy will be valid to the extent of the mortgage debt, which will be considered satisfied so far as policy-moneys extend (*n*). It seems also that if the mortgagor's representative had redeemed the mortgage from other sources he would be entitled to recover on the policy for the benefit of the mortgagor's estate; for Wood, V. C., said, "The object of the condition is to increase the value of the policy to the holder, *i. e.*, in the first place, to the assured; and I do not see how I can hold that in the absence of fraud the estate of the assured is to be deprived of the benefit intended to be given him by the exception, merely because the mortgage happens to be fully secured" (*o*).

[*136] **Policy under Married Women's Property Acts.*—Where a policy has been issued under the Married Women's Property Acts, 1870 and 1882, it would seem to be avoided by suicide of the assured in the same way as any other policy; because if a man is thus allowed to provide for his family in the event of suicide, one

(*l*) Suicide in a sane mind would avoid the policy. *Horn* v. *Anglo-Australian, &c.*, 30 L. J. Ch. 511, per Wood, V. C., reported also 4 L. T. N. S. 142, 7 Jur. N. S. 673, 9 W. R. 359.

(*m*) Per Cockburn, C J, *Jackson* v. *Foster*, *supra*.

(*n*) *White* v *British Empire, &c., Co*, L. R. 7 Eq. 394, 38 L. J. Ch. 53, 17 W. R. 26, 19 L. T. N. S. 306. *Cook* v. *Black*, 1 Hare, 390, 6 Jur. 164, 11 L. J. Ch. 268.

(*o*) *Solicitors and General Life &c., Co.* v. *Lamb*, 2 De G. J. & S. 251, 1 H. & M. 716, 33 L. J. N. S. Ch. 426, 12 W. R. 941, 10 L. T. N. S. 702, 10 Jur. N. S. 739, 4 N. R. 313, followed in *City Bank* v. *Sovereign Life Insurance Co.*, 32 W. R. 657.

restraint against self-destruction is removed, and he might effect such an insurance, intending all the while to terminate his existence. Suicide in this as much as in any other case is a risk not taken into account or insured against by the insurance office.

"*Die by own hands.*"—An assured effected a policy on his own life, in which was a proviso avoiding the same if the assured should "die by his own hands;" and he assigned the policy to trustees of a settlement and covenanted with them to pay the premiums, and to "do and perform all such acts, matters, and things as should be requisite for keeping the policy on foot." *Effect of suicide on covenant to keep policy on foot.*—The assured afterwards drowned himself whilst insane, and in an action against the insurers the Court held the policy avoided, and also that the trustees were not entitled under the covenant to recover the money from the estate of the assured (*p*).

(*p*) *Dormay* v. *Borrodaile*, 11 Jur. 231, 879, 5 C. B. 380, 10 Beav. 335, 9 L. T. 449, 16 L. J. Ch. 337.

[*137] *CHAPTER V.

GENERAL INQUIRIES MADE BY INSURERS.

In life insurance the inquiries made by insurers go to—

1. The age of the applicant.[1] This is important with regard to the average duration of human life. But there may be other circumstances tending to show that the life will be of more or less than average duration.

2. His family history, as giving a clue *ab extra* to his probable constitution and prospect of longevity. Under this head questions are usually asked as to his parents, grand-parents, and brothers and sisters, and what diseases, if dead, they died of.

3. The personal health, present and past, of the applicant, including therein his constitutional history.

4. His moral history, including therein his habits of life past and present. Under this are included questions as to steadiness and sobriety,[2] and whether a man is married or not (*a*).

5. His geographical position.[3] *Cæteris paribus*, insurance rates would be higher in an earthquake district of Southern America than in Great Britain. Besides this, climate is an element in the risk both generally and in respect of the peculiar constitution of individuals, as certain climates are apt to be fatal to men of certain nationalities, constitution, and habits.

6. His occupation. Some trades and occupations are [* 138] more hazardous than others, *e. g.*, a soldier's than *a farmer's a sailor's than a landsman's. And where there is no apparent difference in risk, the statistical tables show a longer average of life in one profession than in another, and insurance companies for the purposes of their business make close investigation of the Registrar-General's returns. Moreover, in accident insurance liability to injury varies very greatly with the occupation irrespective of its healthiness or unhealthiness.

(*a*) *Vide Jeffries* v. *Union Mutual Co.*, 1 McCrary (U. S. Circ. Ct.) 114.

[1] False representation as to age rendered contract invalid. *Sweet* v. *Citizen's Mut. Relief Society*, 78 Me. 541.

[2] If company accepts premiums after notice of change in habits, policy is not rendered void. *Phœnix Life Ins. Co.* v. *Paddin*, 120 U. S. 183. *Pomeroy* v. *Rocky Mountain Ins. Co.*, 9 Col. 295.

[3] Accepting proofs of death and promising payment, company may waive right to claim forfeiture because assured went into torrid zone *Cotton States Life Ins. Co.* v. *Edwards*, 74 Ga. 220.

[4] Change in occupation avoided policy. *Northwestern Mut. Life Ins. Co.* v. *Amerman*, 119 Ill. 329.

Full and fair disclosure is required by good faith from the assured on all these points and on any others inquired of by the insurer, and on all if any other matters within the knowledge of the assured and material to the risk (*b*).

Questions as to misrepresentation and concealment by the assured rarely arise on life policies, owing to the usual procedure in effecting them; for the business of insurance is now reduced to a scientific routine, and a series of carefully drawn questions are put to the applicant, and the truth of his answers is vouched and agreed by him to constitute the basis of the contract, or incorporated by reference or otherwise in the policy; in other words, the facts so stated are said to be warranted (*c*)

Such warranty preludes all dispute as to the materiality of the questions put, but does not constitute the sole obligation of the applicant—since non-disclosure of material facts, not coming within the terms of the warranted declaration, will bar recovery on the policy as effectually as breach of warranty. The object of the procedure above stated is to prevent issues being raised as to the materiality of this or that fact, at a date which in all human probability will be long subsequent to the grant of the policy, and when, possibly, every party to the transaction, or competent *witness thereto, will be as dead as the person on whose life [* 139] it was made.

Age.—1. Age will be admitted by insurers if satisfactory proof be furnished by birth or baptismal certificate. If not admitted but warranted, strict proof is necessary that the age is exactly as warranted (*a*).

Personal health present and past.—3. A man is not bound under the question as to other facts material to the risk, or, in the absence of questions, to disclose anything as to his present or past health, which has not had and is not by its nature calculated to have a steady and continuous effect towards shortening his life (*b*). But predisposition to a disease medically known to have such effect must be disclosed, as also previous attacks of such disease (*c*). The same rules apply as to answering questions regarding serious illness or injury (*d*). In answering this question, honest belief in the truth of the answer is all that is required (*e*), unless the truth of the

(*b*) *Vide* cap. vii., on Misrepresentation.

(*c*) *Vide* cap. vi, on Warranty.

(*a*) *Cazenove* v *British Equitable*, 6 C. B. N. S. 437, 29 L. J. C. P. 160, 1 L. T. N. S. 484, 5 Jur. N S. 1309, 8 W. R. 243. See also *Westropp* v. *Bruce*, Batty (Ir. K. B.) 155, 206. *Life Association of Scotland* v. *Foster*, 11 C. S. C. (3rd series) 351.

(*b*) *Watson* v. *Mainwaring*, 2 Park Ins. 650, 4 Taunt 763.

(*c*) *Morrison* v. *Muspratt*, 4 Bling 60.

(*d*) *Connecticut Co.* v. *Moore*, 6 App. Cas. 644. See *New York Insurance Co.* v. *Flack*, 3 Maryland 341, and *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222, for criterion of seriousness.

(*e*) *Jones* v. *Provincial*, 3 C. B. (N. S) 65, 26 L. J. C. P. 272, 3 Jur. N. S. 1004, 5 W. R. 885. *Thomson* v. *Weems*, 9 App. Cas. 671.

statement is warranted, in which case the untruth, without any moral guilt, avoids the insurance. If a man does not know that certain complaints which he has had come within the scope of the inquiry, the insurer must suffer for his ambiguity (*f*), and his warranties do not extend to latent and unknown disease.

A disease requiring confinement has been held to be one calling for the attendance of a physician (*g*).

[* 140] "A local disease" has in one American case been *held to include the tubercle as a matter of law (*h*). But usually the American Courts leave any question where there is doubt as to the disease being local or general to the jury. English cases are rare, owing to the arbitration clauses contained in policies.

Particular diseases.—Particular diseases must in any case be disclosed if material. The insurers ask specific questions as to certain diseases, such as scrofula, insanity, epilepsy, fits, lung disease, heart disease, rheumatism, gout, and even dyspepsia, but they add general words to bring to the applicant's notice the need of disclosing complaints material to be known for settling the premium or taking the risk. A general question asking whether the applicant ever had any other illness, local disease, or personal injury has been described as embarrassing, and one which could hardly be expected to be answered with strict and liberal truth; for a man of mature age cannot reasonably be expected to recollect and disclose every illness, however slight, or every personal injury consisting of a contusion, cut, or blow, which he might have suffered from in the course of his life; and such a question must be read, to make it reasonable, with some limitation and qualification as referring only to indisposition of a somewhat severe or serious character (*i*).

Afflicted with fits.—Afflicted with fits means constitutionally liable to them, *e. g.*, epileptic (*j*), but even if the words "epileptic or other fits" be used, fainting fits are not included (*k*).

American cases distinguish from this the question, "Have you ever had fits?" (*l*).

Afflicted with gout.—A man may honestly say "No" to the question whether he had gout, though to a doctor it would be

[* 141] *clear, from symptoms not felt, or if felt not understood, by the life that the gout was flying about his system (*m*).

Spitting of blood.—Only what is the result of the diseases called spitting of blood need be specified, *i. e.*, bringing blood from throat

(*f*) *Life Assurance of Scotland* v. *Foster*, 11 C. S. C. (3rd series) 351.
(*g*) *Cazenove* v. *British Equitable*, *supra*.
(*h*) A Californian case, 42 Cal. 523; but see *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222.
(*i*) *Connecticut Mutual, &c., Co.* v. *Moore*, 6 App. Cas. 648.
(*j*) *Chattock* v. *Shaw*, 1 M. & R. 498.
(*k*) *Shilling* v. *Accidental Death*, 1 F. & F. 116, 2 H. & N. 42, 27 L. J. Ex. 16. 5 W. R. 567.
(*l*) *Etna Ins. Co.* v. *France*, 94 U. J. (4 Otto) 561.
(*m*) *Fowkes* v. *Manchester*, 3 B. & S. 917, 32 L. J. Q. B. 153, 8 L. T. N. S. 309, 11 W. R. 622.

or lungs (not from the teeth or stomach) (*n*), as a symptom of a disease tending to shorten life.

Medical attendance.—As a means of testing the accuracy of statements as to health, reference is required to the usual medical attendant (*o*) of the applicant, and for him to say that he had no medical man, though he had recently, if only once, been attended for a severy illness, would preclude his recovering under the policy (*p*).

When the usual medical attendant is asked for, it is not enough in case of a change, *e. g.*, on marriage, to name the doctor last attending, if another has previously and for long attended. It is for the jury to say whether the last is the usual medical attendant (*q*).

If the usual attendant has not been called in for some time, and another has been employed, giving the name of the former is enough (*r*).

But the question seems to be for the jury in most cases (*s*); and they have found that omission to state the name of the doctor who attended deceased for *delirium *tremens* is not [* 142] fraudulent (*t*), though judges are of a contrary opinion (*u*).

Moral history past and present.—4. Communications of habits tending to shorten life must be made (*x*). The habit of using opium, laudanum, or drinking is within this rule. If a man has had *delirium tremens* within the year (*y*), or is habitually intemperate (*z*), it must be disclosed. In America a distinction for these purposes is taken between perodical bouts and steady drinking (*a*), and it has been held by Lord Blackburn that the warranty as to temperance must be construed with reference to the habits of people in the class and in the locality where the insured lives (*b*). Lord Watson,

(*n*) *Geach* v. *Ingall*, 14 M. & W. 95, 15, L. J. Ex. 37, 9 Jur. 691. *Watson* v. *Mainwaring*, 4 Taunt. 763.

(*o*) *Maynard* v. *Rhode*, 5 Dowl. & R. 266, 1 C. & P. 360. *Everett* v. *Desborough*, 5 Bing. 503.

(*p*) *Palmer* v. *Hawes*, (1841), Ellis Ins. 131. See *Connecticut Co.* v. *Moore*, 6 App. Cas. 644. *British Equitable Co.* v. *Musgrave*, per Kay, J., Times Law Rep. vol. 3, p. 630.

(*q*) *Huckman* v. *Fernie*, 3 M. & W. 505, 517, 7 L. J. N. S. Ex. 163, 2 Jur. 444. *Everett* v. *Desborough*, 5 Bing. 503. *Connecticut Co* v *Moore*, 6 App. Cas. 644.

(*r*) *Maynard* v. *Rhode*, 1 C. & P. 360, 5 D. & R. 266. *Connecticut Co.* v. *Moore*. 6 App. Cas 644.

(*s*) *Scanlon* v. *Sceales*, 13 Ir. Law Rep. 71 (1849.)

(*t*) *Hutton* v. *Waterloo*, 1 F. & F. 735. *Abbot* v. *Howard*, Hayes (Ir.) 381.

(*u*) *Life Association of Scotland* v. *Forster*, 11 C. S. C. (3rd series) 351.

(*x*) *Forbes* v. *Edinburgh Life*, 10 C. S. C. (1st series) 451.

(*y*) *Hutton* v. *Waterloo*, 1 F. & F. 735. *Scottish Equitable* v. *Buist*, 4 C. S. C. (4th series) 1076, affirmed by H. L 5 C. S. C. 64 (H. L.)

(*z*) *Southcomb* v. *Merriman*, Car. & M. 286.

(*a*) See May 396 and 397, and the charge to the jury in *Swick* v. *Home Life*, 2 Dill. (C. Ct U. S.) 160.

(*b*) Per Lord Blackburn, *Thomson* v *Weems*, 9 App. Cas. 684–5. *Weems* v. *Standard Co.*, 21 Sc. L. R. 791.

however, would not go farther than to allow the assured's position in life, and the habits of the class to which he belonged, to be taken into account (*c*).

It is not frequently provided that the warranty of temperate habits should apply not only to past and present, but also be promissory, and death by or during intoxication is excepted from the risk.[5]

In one case (*d*) concealment of the fact that the person whose life was insured had had a child (she was unmarried) was held material, and a nonsuit entered.

Residence.—5. A statement that A. resided at B., but omitting to say that he was in prison there, was held fatal, to the [*143] *right to recover on the policy, as confinement and want of air and exercise were deemed prejudical to the life (*e*). Omission to disclose a long previous residence in the tropics would probably be so likewise. But it has been recently held that to insert merely temporary residence, and not the domicile, is not fatal (*f*).

Occupation.—6. It is not necessary to disclose anything as to the occupation of the proposed assured, unless it is material to the risk, or asked for by the insurer (*g*).[6]

When a man is asked for his present occupation, he must state it, even if his regular occupation has been different, and it is likely to be resumed (*h*).

To describe himself as esquire is not a satisfactory answer to a question as to occupation, but does not amount to a statement that the declarant has no occupation (*i*). The proposed assured was in business as an ironmonger, and described himself in the proposal simply as esquire, yet it did not vitiate his claim on the company.

(*c*) Same case, p. 696.
(*d*) *Edwards* v. *Barrow*, Ellis Ins. 128.
(*e*) *Huguenin* v. *Bayley*, 6 Taunt. 186
(*f*) *Grogan* v. *London and Manchester Co*, 53 L. T. 761.
(*g*) *Lindenau* v. *Desborough*, 8 B. & C. 586, 592.
(*h*) *Hartmann* v. *Keystone State*, 21 Penn. 466.
(*i*) *Perrins* v. *Marine and General Travellers*, 2 E. & E. 317, 29 L. J. Q. B. 17, 242, 2 L. T. N. S. 633, 6 Jur. N. S. 69, 627, 8 W. R. 41, 563

[5] If death resulted from excessive use of alcoholic stimulents, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words "so far intemperate as to impair health." *Aetna Life Ins. Co.* v. *Davey*, 123 U. S. S C. 739.

[6] Change in employment of insured avoided policy. *Northwestern Mut. Life Ins. Co.* v. *Amerman*, 119 Ill. 329.

*CHAPTER VI. [*144]

WARRANTY.

Difference between warranty in marine and other policies.—Lord Blackburn said in *Thomson* v. *Weems* (*a*): "In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words, and in whatever place, to be construed as a warranty, and *prima facie*, at least, the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies."

Warranty in all policies.—It is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with; if immaterial, that immateriality may be inquired into and shown; but if there is a warranty, it is part of the contract that the matter is such as it is represented to be, therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact. When it is agreed in any contract of insurance that a particular statement shall form the basis of the policy, the truth of that statement is warranted (*b*).

Warranties and conditions must be true.—Warranties and conditions, being a part of the contract, must be true if affirmative, and if promissory must *be complied with, otherwise the con- [* 145] tract cannot be enforced, notwithstanding the good faith of the assured. They are either express or implied (*c*). The warranty must be in the policy, or incorporated therein by reference (*d*). Implied warranties are, however, almost, if not quite, confined to marine insurance.

No particular words necessary for warranty.—No particular words are necessary to constitute a warranty; hence where a ship was insured, and in the margin was written "eight nine-pounders with close quarters, six six-pounders on her upper decks, thirty seaman, besides passengers," these words were held to amount to a warranty that the ship was so provided (*e*).

(*a*) 9 App. Cas. 684, 21 Sc. L. R. 791.
(*b*) *Newcastle Fire Insurance Co.* v. *M'Morran*, 3 Dow H. L. 255. *Thomson* v. *Weems*, 9 App. Cas. 671. *Weems* v. *Standard Co.*, 21 Sc. L R. 791.
(*c*) *Gibson* v *Small*, 4 H. L. C. 353.
(*d*) *Routledge* v. *Burrell*, 1 Hy. Bl. 255. *Worsley* v. *Wood*, 6 T. R. 710.
(*e*) *Bean* v. *Stupart*, Doug. 11.

The following words were written in the margin of the policy: "In port, 20th July, 1776." The ship was proved to have sailed on the 18th July, and Lord Mansfield held that this was clearly a warranty; and though the difference of two days might not make any material difference in the risk, yet, as the condition had not been complied with, the insurer was not liable (*f*).

Facts warranted must be true though immaterial.—The truth and not the materiality of the answers is the question to be considered when the answers of the party proposing to effect the insurance form part of the contract. Thus where a party who desired to insure his life received a form of proposal containing the following questions: "Did any of the party's near relatives die of consumption or any other pulmonary complaint? Has the party's life been accepted or refused at any office?" and to these questions the answer "No" was untruly returned (*g*), the policy having expressed that if any false statement was made to the company in or about the obtaining or effecting of the insurance, the policy [* 146] should be void, the House *of Lords decided that the answers of the intending insurers being part of the contract, their truth and not their materiality was in question (*h*).

Warranties and conditions precedent must be strictly performed.—It may be here mentioned that a condition precedent forming part of the contract must, like a warranty, be strictly performed. By the proposals it stipulated "that persons assured should procure a certificate from the minister, churchwardens, and some respectable householders of the parish not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned." It was held that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, churchwardens, &c., wrongfully refused to sign the certificate (*i*).

Fact warranted must be strictly true.—Where the questions and answers of a proposal form the basis of the contract, their materiality cannot be disputed by the assured (*k*), and where a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void and there is no contract. Therefore where a policy of fire insurance on a mill contained the following warranty: "Warranted that the above mill is comfortable to the first class of cotton and woolen

(*f*) *Bean* v. *Stupart*, Doug. 12 note.

(*g*) *London Assurance* v. *Mansel*, 11 Ch. D. 363, 48 L. J. Ch. 331, 27 W. R. 444. And see *Russell* v. *Canada Life Co.*, 32 U. C. (C. P.) 256.

(*h*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484, 17 Jur. 995. See also per Lord Blackburn, *Thomson* v. *Weems*, 9 App. Cas. 671.

(*i*) *Worsley* v. *Wood*, 6 T. R. 710.

(*k*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484, 17 Jur. 995.

rates delivered herewith," the mill proved not to be of the first class and the House of Lords decided that an action on the policy could not be supported. In giving judgment Lord Eldon said: "It is a first principle of the law of insurance on all occasions that where a representation is material it *must be complied [* 147] with; if immaterial, that immateriality may be inquired into and shown; but if there is a warranty, it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact. What is the building *de facto* that I have insured? (*l*). But where a policy on cotton-mills contained a warranty that they should be worked by day only, and a steam engine and horizontal shafts were worked by night, it was held to be no breach of the warranty (*m*). And a warranty that a mill is "worked by day" only is not broken by some portion of the machinery being in motion by night. (*n*).

Not every answer to a question put by the insurers is a warranty. Answers may be mere statements of intention or opinion, and not intended as warranty or representation (*o*).

Expression of intention or opinion.—Thus a steamer was insured and was described by the assured as 'now lying in the T. dock and intended to navigate the St. Lawrence as a freight boat, and to be laid up for the winter in a place approved by this company." The vessel was destroyed eleven months afterwards by fire, and had remained in dock the whole time, and it was held (reversing the judgment of the Queen's Bench of Lower Canada) that the words were not a warranty, but merely expressed an intention that the vessel should navigate as mentioned (*p*).

Insured need not state in detail facts covered by warranty.—The insured is not bound to state in detail facts covered by a warranty except in answer to inquiries *made by the in- [* 148] surers; *e. g.*, where a life was insured with warranty that the life was a good one and the person whose life was insured suffered from an old wound, which circumstance was not mentioned to the insurers, the life having died from an illness which had no connection with the wound, the non-disclosure did not disentitle the assured from recovering, because the question to be decided was—Has the warranty been proved true? in other words, Was the life a good one? not, Was the life subject to any particular infirmity? Lord Mansfield said: "Where an insurance is upon a repre-

(*l*) *Newcastle Fire Insurance Co.* v. *M'Morran*, 3 Dow H. L. 255

(*m*) *Whitehead* v. *Price*, 2 C. M. & R. 447. *Mayall* v. *Mitford*, 6 A. & E. 670.

(*n*) *Mayall* v. *Mitford*, 6 A. & E. 670, 1 N. & P. 732. *Whitehead* v *Price*, 2 C. M. & R. 447, 1 Gale Ex. 151.

(*o*) *Benham* v. *United Guarantee Co.*, 21 L. J. Ex. 317, 16 Jur. 691, 7 Ex. 744. *Anderson* v. *Pacific Co.*, L. R 7 C. P. 65, 26 L. T. N. S. 130, 20 W. R. 280.

(*p*) *Grant* v. *Etna Insurance Co.*, 15 Moore P. C. 516, 6 L. T. N. S. 735, 8 Jur. N. S. 705, 10 W. R. 772.

sentation, every material circumstance should be mentioned, such as age, way of life, &c., but where there is a warranty nothing need be told, but it must in general be proved, if litigated, that the life was in fact a good one," and so it may be though he have a particular infirmity (*q*).

"The insurers may stipulate for any warranty they please, and if the assured undertakes that warranty, although it may be something not within his or her knowledge, he or she must abide the consequences. But when the insurers intend that there is a warranty of that sort, they must make it very plain that such is their intention (*r*). They must use unequivocal language, such as persons of ordinary intelligence may without any difficulty understand" (*s*).

"*So far as known.*"—A warranty that facts stated are true, "so far as known to the applicant," will be construed less strictly than one without these qualifying words. Proof that the applicant knew facts not stated would be on the defendants (*t*).

[* 149] **Warranty of good health means of reasonably good health.*—Where there is a warranty that the person whose life is insured is in health, or in good health, it is sufficient if he is in a reasonably good state of health, and even if he laboured under a particular infirmity, if it can be proved by medical men that it did not at all in their judgment contribute to his death, the warranty of health has been fully complied with, and the insurer is liable. Therefore where a policy contained a warranty that B. was in good health when the policy was underwritten, and it appeared in evidence that, though he was troubled with spasms and cramps from violent fits of gout, he was in as good a state of health when that policy was underwritten as he had enjoyed for a long time, Lord Mansfield said: "Such a warranty could never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us" (*u*).

Assured not subject to gout or fits.—So where a policy contains a warranty that the assured "has not been afflicted with nor is subject to gout, fits, &c.," such warranty is not broken by the fact of the assured having had an epileptic fit in consequence of an accident. Lord Abinger said: "The interpretation I put on a clause of this kind is not that the party never accidentally had a fit, but that he was not at the time of the assurance being made a person habitually or constitutionally afflicted with fits, a person liable to

(*q*) *Ross* v. *Bradshaw*, 1 Wm. Bl. 312, 2 Park Ins. 934 (8th ed.). *Willis* v. *Poole*, 2 Park 935 (8th ed.).

(*r*) *Gibson* v. *Small*, 4 H. L. C. 353.

(*s*) *Life Association of Scotland* v. *Foster*, 11 C. S. C. (3rd series) 351, 364, per Lord Deas, 371 per Lord Ardmillan. *Duckett* v. *Williams*, 2 Cr. & M. 348, distinguished. *Hare* v *Barstow*, 8 Jur. 928.

(*t*) *Wilkins* v. *Germania*, 57 Iowa 529 *Garcelon* v. *Hampden Insurance Co.*, 50 Maine 580.

(*u*) *Willis* v. *Poole*, 2 Park 935 (8th ed.). *Ross* v. *Bradshaw*, 1 Wm. Bl. 312, 2 Park 934 (8th ed.).

fits from some peculiarity of temperament either natural or contracted from some cause or other during life" (*x*).

Material statement untrue, but not to knowledge of assured.—A proviso in a policy that if the declaration under the hand of the person assured delivered at the insurance office as the basis of the insurance is not in every respect true, and that if there has been any misrepresentation, &c., then the insurance shall be void, will *avoid the policy, if a statement of a material fact con- [* 150] tained in the declaration is untrue, though not to the knowledge of the assured (*y*).

Effect of breach of warranty on return of premiums.—If there is a warranty of a particular fact *simpliciter*, *e. g.*, against disease, then, if it is proved untrue, the risk will never have attached; the premiums therefore will never have become due, and may, if paid, be recovered back as money paid without consideration. But if it is also a term of the contract that if the statements are untrue the premiums shall be forfeited, then what is untrue so as to avoid the insurance is also untrue so as to cause the forfeiture of the premium (*z*).

Evidence of warranty.—The warranty or condition must be contained in the policy or in some paper referred to by the policy, and if a policy under seal refer to conditions contained in a printed paper without seal or signature, those conditions become part of the contract between the parties, and must be complied with before the assured can recover (*a*).

But though a written paper be wrapt up in the policy when it is brought to the insurers to subscribe, and shown to them at that time, or even though it be wafered to the policy at the time of subscribing, still it is not in either case a warranty or to be considered as a part of the policy itself, but only as a misrepresentation (*b*).

Declarations of insured as evidence of breach of warranty.—Declarations of the insured uttered some 2½ years *before [* 151] the insurance, and not shown to have been parts of the *res gestæ* of any acts or facts indicating a diseased condition of the insured, which the declarations tended to explain, have in America been held not admissible to show a breach of warranty (*c*).

Particulars required.—If the insurers dispute the title to recover

(*x*) *Chattock* v. *Shawe*, 1 Mo. & Rob. 498.

(*y*) *M'Donald* v. *Law Union Fire and Life Assurance*, L. R. 9 Q. B. 328, 43 L. J. Q. B. 131, 30 L. T. N. S. 545, 22 W. R. 530. *Life Assurance of Scotland* v. *Foster*, 11 C. S. C. (3rd series) 351. *Hutchison* v. *National*, 7 C. S. C. (2nd series) 467. *M'Laws* v. *U. K. Temperance*, 23 C. S. C. (2nd series) 559. *Thomson* v. *Weems*, 9 App. Cas. 684. *Weems* v. *Standard Co.*, 22 Sc. L. R. 791.

(*z*) *Thomson* v. *Weems*, 9 App. Cas. 671. *Weems* v. *Standard Co.*, 21 Sc. L. R. 791.

(*a*) *Routledge* v. *Burrell*, 1 H. Bl. 255. *Worsley* v. *Wood*, 6 T. R. 710. *Oldham* v. *Bewicke*, 2 H. Bl. 577 note.

(*b*) *Bean* v *Stupart*, 1 Doug. 12 note.

(*c*) *Penn'y'rania Mutual Life Insurance Co.* v. *Wiler*, 50 Am. Rep. 769.

on the policy on the ground that in the proposals the assured stated he had not had certain diseases, whereas he in fact at the time had one of them, they will be obliged to give particulars of the symptoms of the disease alleged (*d*).

Where a company takes over business of another company and issues new policy, warranties, &c., relate to date of original policy.—If one company takes over another's business, and issues a new policy of its own for one surrendered, the warranties therein relate back to the date of the original and not of the substituted policy (*e*). The liability is shifted or re-insured, not lessened or altered.

The insurers are not precluded from setting up breach of warranty in proposals by the fact that they have doubted their truth and have sought and received from their agent a further and at one time satisfactory report (*f*).

(*d*) *Marshall* v. *Emperor Life*, L. R. 1 Q. B. 35, 35 L. J. Q B. 89, 13 L. T. N. S. 281, 12 Jur. N. S. 293. *Girdlestone* v. *North British and Mercantile*, 11 Eq 197, 40 L. J. Ch. 230, 23 L. T. N. S. 392; followed in America, *Dwight* v. *Germania*, 22 Hun. (N. Y.) 167.

(*e*) *Cahen* v. *Continental Life*, 69 N. Y. 300.

(*f*) *Russell* v. *Canada Co*, 8 Ontario (App.) 716.

CHAPTER VII. [152]

MISREPRESENTATION AND CONCEALMENT.

Uberrima fides required in contracts of insurance.—The utmost degree of good faith is required from an assured in effecting a policy of assurance. He must not only state all matters within his knowledge which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals or fails to disclose anything that may influence the rate of premium which the insurers may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy (*a*).

Materiality question for jury.—It is a question for the jury whether any particular fact is or is not material when its truth is not warranted or made a condition precedent (*b*).

All material facts to be disclosed.—Policies of insurance are made upon an implied contract between the parties that everything material known to the assured should be disclosed. That is the basis on which the contract proceeds, and it is material to see that it is not obtained by means of untrue representation or concealment in any respect (*c*) that *means in any material respect [* 153] (*d*), any respect which a reasonable man would think material (*e*).

Mr. Justice Bayley said: "It does not matter whether the insurance is on ships, houses, or lives, the insurer should be informed of every material circumstance within the knowledge of the assured; and the proper question is whether any particular circumstance was in fact material, and not whether the party believed it to be so" (*f*).

(*a*) Per Rolfe, B. *Dalglish* v. *Jarvie*, 2 M'N. & G. 231, 243. See also *London Assurance* v. *Mansel*, L. R. 11 Ch. D. 368, 48 L. J. Ch. 331, 27 W. R. 444. *Maynard* v. *Rhode*, 1 Car. & P. 360, 5 Dowl. & R. 266. *M'Donald* v. *Law Union, &c.*, L. R. 9 Q. B. 328, 43 L. J. N. S. Q. B. 131, 30 L. T. N. S. 545, 22 W. R. 530. *Duckett* v. *Williams*, 3 L. J. N. S. Ex. 141, 2 Cr. & M. 348. *Moens* v. *Heyworth*, 10 M. & W. 147, per Parke, B. 157. *Wainwright* v. *Bland*, 5 L. J. N. S. Ex. 147, 1 M. & W. 32, 1 Mo. & R. 481. *Fowkes* v. *London and Manchester*, 8 L. T. N. S. 309, 32 L. J. Q. B 153, 3 B. & S. 917, 11 W. R. 622.

(*b*) *Lindenau* v. *Desborough*, 8 B. & C. 586. *Morrison* v. *Muspratt*, 4 Bing. 60.

(*c*) *Moens* v. *Heyworth*, 10 M. & W. 157.

(*d*) *London Assurance* v. *Mansel*, 11 Ch. C. 368, per Jessel, M. R.

(*e*) *Lindenau* v. *Desborough, ubi sup*, per Lord Tenterden.

(*f*) *Benham* v. *United Guarantee Co.*, 7 Ex. 744, 21 L. J. Ex. 317, 16 Jur. 691 *Lindenau* v. *Desborough, ubi sup*, per Bayley, J. *Newcastle Fire Co.* v. *M'Morran*, 3 Dow, H. L. 255.

Mr. Justice Littledale said: "It is the duty of the assured in all cases to disclose all material facts within their knowledge. The non-answering of a specific question would amount to concealment if the man knew the fact and was able to answer it" (*g*).

Insurance without any representation by assured.—When a man effects an insurance upon a life generally without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances which he knew or by alleging what was false. If the person insuring knew no more than the insurer, the latter takes the risk (*h*).

Mere "belief" of assured that life in good health.—If the person effecting the insurance only says "he believes" the person whose life is insured "to be in good health," knowing nothing about it nor having any reason to believe the contrary, then, though the person is not in good health, it would not avoid the policy, because the insurer takes the risk upon himself (*i*).

[* 154] **What is concealment.*—If a man purposely avoids answering a question, and thereby does not sate a fact which it is his duty to communicate, that is concealment, Concealment, properly so called, means non-disclosure of a fact which it is a man's duty to disclose (*k*).[1][2]

Condition Misdescription.—The condition in a fire policy as to misdescription of the premises applies only to the condition of the premises when the policy begins to run. If the description is not correct, the policy does not begin to run at all, or only as to parts unaffected by the breach of condition. If it is fully performed, nothing which happens afterwards, nor even a change of business, could effect the policy as to that condition (*l*).

If there is fraud in a representation, it avoids the policy as a fraud, but not as a part of the agreement (*m*).

Effect of misrepresentation where part of policy.—If representations are made part of the policy, they become warranties; and if they are untrue, the policy will be avoided, even if the loss has not arisen from the fact concealed or misrepresented (*n*).

(*g*) *London Assurance* v. *Mansel*, 11 Ch. D. 869, per Jessel, M. R.

(*h*) Per Lord Mansfield. *Ross* v. *Bradshaw*, 1 W. Bl. 312, 2 Park Ins. 934 (8th ed.).

(*i*) *Pawson* v. *Watson*, 2 Cowp. 787.

(*k*) *London Assurance* v. *Mansel*, 11 Ch. D. 870, per Jessel, M. R., 48 L. J Ch. 331, 27 W. R. 444; and *vide supra*, p. 151, per Littledale, J.

(*l*) *Pim* v. *Reid*, 6 M. & G. 1 (24), 12 L. J. C. P. 299. *Shaw* v. *Robberds*, 1 N. & P. 279, 6 A. & E 75, 6 L. J. N. S. K. B. 106.

(*m*) Per Lord Mansfield. *Pawson* v. *Watson*, 2 Cowp. 787.

(*n*) *Maynard* v. *Rhode*, 1 Car. & P. 360, 5 Dowl. & Ry. 266.

[1] Where questions in application, for life insurance, appears to be not answered, or to be imperfectly answered, issue of policy is waiver of imperfection. *Phœnix Mut. Life Ins. Co.* v. *Paddin*, 120 U. S 183.

[2] In absence of fraud applicant will not be heard to say that certain questions in the application where in fact not asked. *Cuthbertson* v. *North Carolina Home Ins. Co.*, 96 N. C. 480.

Misrepresentation by insurer.—The policy would equally be void if the insurer misrepresented or concealed a material fact; as, for example, if he insured a ship on her voyage which he privately knew to be arrived; and an action would lie against him to recover the premium. "The govering principle," said Lord Mansfield, "is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary" (*o*).

**Statements must be true at time contract of insurance actually made.*—Statements made by a person in a proposal for life assurance must be true at the time at which the contract of assurance is actually made. Therefore where statements regarding the proposer's health were to be taken as the basis of the contract, and the proposal containing them was accepted upon the terms that no insurance should take place until the first premium was paid, the company were held justified in refusing to accept the premium, a material alteration having occurred in the proposer's health between the date of the proposal and the tender of the premium (*p*). [* 155]

Agent of assured must disclose fully.—Any person acting by the direction of the insured, and who is instrumental in procuring the insurance, is bound to disclose all he knows to the insurers before the policy is effected, and where any misrepresentation arises from his fraud or negligence the policy is void (*q*).

Even if insurance effected by another agent.—The insurance is also vitiated if there be misrepresentation or concealment by any agent employed by the assured to obtain the policy, and whose duty it was not to have so misrepresented or concealed, even though the policy be actually effected by another agent unaware of such misrepresentation or concealment, but subsequently to the receipt of the information concealed (*r*).

Statements by life assured.—If before a policy of life insurance is effected the life insured is applied to by the office for and gives information, he is regarded as the agent of the assured, who is bound by his statements even though the assured is a stranger to and acquainted with him; and if such statements are false, the assured will not be able to recover from the insurance office. And this is so although the assured should leave it to the *agent [* 156] of the insurance office to obtain the information (*s*).

Answers given by the life insured must be true.—An insurance was effected by a creditor on the life of his debter, who gave untrue

(*o*) *Carter* v. *Boehm*, 3 Burr. 1910.

(*p*) *Canning* v. *Farquhar*, 16 Q. B. D. (C. A.) 727, 55 L. J. Q. B. 225, 54 L. T. 350, 34 W. R. 423.

(*q*) *Fitzherbert* v. *Mather*, 1 T. R. 12. Re *Universal Non-Tariff Fire Co., Forbes' claim* L. R. 19 Eq. 485, 44 L. J. Ch., 761, 23 W. R. 464.

(*r*) *Blackburn Low & Co.* v. *Vigors*, 17 Q. B. D. (C. A.) 553, 55 L. J. Q. B. 347, 54 L. T. 852.

(*s*) *Everett* v. *Desborough*, 5 Bing. 503.

answers to the questions, "Who is your medical attendant? Have you ever had a serious illness?" The creditor was ignorant of the misrepresentation, and the debtor did not die of the disease he was then afflicted with; but it was held that the misrepresentation avoided the policy, for being part of the policy, the bargain was only conditional, and it was equally a condition let it be made by whomsoever it may (*t*).

Misrepresentation through agent of Company.—If the misdescription is in fact due to the act of an agent of the company, even if material, it will not affect the policy (*u*).

"*Spitting blood*" *untrue statement regarding.*—One of the terms of a policy of life assurance was that it should be void if anything stated by the assured was untrue. The assured stated that he had not had any spitting of blood, and the Court held that as one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, the fact should be stated (*x*).

Temperate habits.—Where a policy of life assurance is effected, and a declaration made by the assured that the person whose life is insured is of sober and temperate habits, upon a question being raised after his death as to his sobriety, the jury have to say, not whether the deceased was intemperate to such a degree as to injure his health, but whether he was of sober and temperate habits at the time of the insurance. There is nothing to prevent an [* 157] office from stipulating that even though a man's health *be not impaired, every person whose life is insured at their office shall be a person of temperate habits (*y*).

Proof of intemperance.—Where the insured has warranted himself temperate in his habits and that he has always strictly been so, the insurers must (says Lord Blackburn), to successfully resist payment, "prove drinking carried on, before the date of the warranty, to such an extent as to amount to intemperance, and so often and continuously as to amount to habits of intemperance. They are not obliged to prove anything more." In the construction of such a warranty the same learned lord held that "we must take into account the normal habits of people in the class and in the locality where the person insured lives" (*z*).

Meaning of "under influence of liquor.—The expression "under the influence of liquor" in an accident policy means "that a man's conduct is banefully influenced by the liquor he has drunk" (*a*), or that he is "under such influence of intoxicating liquor as dis-

(*t*) *Maynard* v. *Rhode*, 1 Car. & P. 360, 5 Dowl & R. 266.

(*u*) Re *Universal Non-Tariff Fire Co.*, Ex parte *Forbes' claim*, *supra*. *Somers* v. *Athenæum, &c., Co*, 9 Lr. Can. Rep. 61, 3 Lr. Can. Jur. 67.

(*x*) *Geach* v. *Ingall*, 14 M. & W. 95, 15 L. J. Ex. 37, 9 Jur. 691.

(*y*) *Southcomb* v. *Merriman*, Car. & Mar. 286.

(*z*) Per Lord Blackburn, *Thomson* v. *Weems*, 9 App. Cas. 684. *Weems* v. *Standard, &c., Co.*, 21 Sc. L. R. 791. Lord Watson, however, differed as to "locality;" see p. 696.

(*a*) *Macrobbie* v. *Accident Insurance Co*, 23 Sc. L. R. 391.

turbs the balance of a man's mind or the intelligent exercise of his faculties" (*b*).

A provision in a life policy that the assurance should "not extend to any death, or injury, happening whilst the assured was under the influence of intoxicating liquor" means that the insurance will not extend to a death, or injury causing death, happening whilst the assured is under the influence of intoxicating liquor; and therefore it would suffice for an insurer, in resisting the claim, to show that the assured was under such influence when he received the injury from which death afterwards resulted (*c*).

Has proposal been declined by any other office? is material question.—The question "whether a proposal has been declined by any other office" is a material one, and must be *truly [* 158] answered by an intending assured, otherwise the policy granted to him will be void (*d*).

Condition. Concealment. Omission.—But a mere omission in a proposal to fill in any answer to a question whether the insured has ever been a claimant on a fire insurance company, he having in fact been so, is not a concealment of a material fact (*e*). The insurers should insist on an answer, as the grant of a policy without it may amount to a waiver.

Non-communication of former illness.—A policy of insurance on the life of another, who at the time of the insurance is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having a few years before been afflicted with a disorder tending to shorten life, if it appear that the disorder was of such a character as to prevent the party from being conscious of what had happened to him whilst suffering under it (*f*). *Untrue but innocent statement as to health.*—An untrue statement of the assured as to the state of his health, if made in ignorance of his true physical condition, will not in general vitiate the policy (*g*).

Usual medical attendant.—A medical man who has attended only once ought not to be named as the usual medical attendant of the person whose life is insured. The word "usual" implies having attended more than once (*h*).

Reference to wrong medical man.—If there be a reference to a man who had been the medical attendant, and no reference to the person who was the medical attendant of the life insured at the time

(*b*) *Mair* v. *Railway Passengers' Insurance*, 37 L. T. 356.

(*c*) *Ibid.*

(*d*) *London Assurance* v. *Mansel*, L. R. 11 Ch. D. 363, 48 L. J. Ch. 331, 27 W. R 444.

(*e*) *London and Lancashire Insurance Co.* v. *Honey*, 2 Victoria Law 7.

(*f*) *Swete* v. *Fairlie*, 6 C. & P. 1.

(*g*) *Fowkes* v. *London and Manchester Insurance Co*, 8 L. T. N. S. 309, 32 L. J. N. S. Q. B. 153, 3 B. & S. 917, 11 W. R. 622; but *vide Thomson* v. *Weems*, 9 App. Cas. 684.

(*h*) *Huckman* v *Furnie*, 3 M. & W. 505, 520, 7 L. J. N. S. Ex. 163, 2 Jur. 444.

the policy was effected, such an omission to refer to the proper person would vacate the policy (*i*).

[* 159] **Place of residence. Assured in goal.*—The assured being in goal at Fisherton Auger, but who had previously lived in her own house at the same place, employed an agent to effect a policy of insurance on her life. One condition of the insurance was that a declaration should be made of the state of the health of the life insured, and the agent stated that he had proposed on behalf of Elizabeth Swayne (the assured) of Fisherton Auger, and that she was then resident there. It was stipulated that the policy was to be valid only if the statement were free from all misrepresentation or reservation, and it was held to be a question for the jury whether the imprisonment was a material fact, for, if so, the keping it back would be fatal to the recovery of the money from the insurance company (*k*).

Meaning of "residence."—The term "residence" in the proposal for an insurance means the place where the proposer is living or residing at the time of making the proposal, and not where he has been residing before or where he is going to reside afterwards; therefore, where, in a proposal to an insurance office for a life policy, the proposer gave of his residence the address where he was then and was going to be at for the next three months, although he usually resided in Ireland, and returned there three months afterwards, it was held that the place of residence was not untruly stated (*l*).

Concealment of fire to adjacent premises.—The plaintiff having one of several warehouses next but one to a boat-builder's shop, which took fire on the same evening after that fire was apparently extinguished, insured that warehouse without apprising the insurers of the neighboring fire. Though the terms of the insurance did not expressly require the communication, it was held that the concealment of this fact avoided the policy (*m*).

[*160] **Statement partially true.*—A statement true as far as it goes, but not the whole truth, and not a complete answer to the question which it proposes to answer, is untrue within the meaning of a condition that "any untrue statement shall avoid the policy" (*n*). But where, in answer to a question as to the name and residence and profession or occupation, the proposal stated "A. B. of S. Hall, Esquire," the person being an ironmonger though resident at S. Hall, and being also an esquire, the statement was held not to be untrue, though it was imperfect (*o*).

What must be stated under the general question.—Under the general

(*i*) *Everett* v. *Desborough*, 5 Bing. 514, per Tindal, C. J.

(*k*) *Huguenin* v. *Ragley*, 6 Taunt 186.

(*l*) *Grogan* v. *London and Manchester Industrial Co.*, 53 L. T. 761.

(*m*) *Bufe* v. *Turner*, 6 Taunt. 338.

(*n*) *Cazenove* v. *British Equitable*, 6 C. B. N. S. 437, 29 L. J. C. P. 160, 1 L. T. N. S. 484, 5 Jur. N S. 1309, 8 W R. 243.

(*o*) *Perrins* v. *Marine and General Travellers*, 2 E. & E. 317, 29 L. J. Q. B. 17, 242, 2 L. T. N. S. 633, 8 W. R. 565, 6 Jur. N. S. 69, 627.

question put by an insurance office, "Is there any other circumstance within your knowledge which the directors ought to be acquainted with?" it is the duty of a party effecting an insurance to communicate to the office information of every fact which any reasonable man would think material, and it is a question for the jury whether any particular fact was or was not material (*p*).

Description substantially correct.—If the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material; hence where buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt, and no higher premium would have been charged if the fact had been disclosed, it was held that the misdescription was immaterial and not sufficient to vitiate the policy (*q*). But concealment of the fact that a wooden building behind a warehouse was used as a kitchen has in Canada been *held fatal (*r*). [* 161] A statement that no fire is kept and no hazardous goods deposited refers to natural use of fire and deposit of goods (*s*).

Effect of concealment as against purchaser without notice.—Suppression of a fact material to the insurance company to know, discovered between the acceptance by the office and payment of the first premium, will avoid the policy even as against a purchaser for value without notice (*t*).

Misrepresentation by one company to another on re-insurance.—And where one insurance company induced another insurance company to grant a policy by way of re-assurance on the representation that they, the former company, intended to retain part of the risk, which, however, they subsequently got rid of by a further re-assurance, the policy was declared void (*u*).

Effect of innocent misrepresentation, where stipulation that untrue statement should forfeit all money paid.—Where it was stipulated that in case of an untrue statement all moneys paid on account of the insurance should be forfeited and the insurance itself should be null and void, both the policy-money and the premiums were forfeited by a statement as to the health of the life insured, untrue in point of fact, though not within the knowledge of the party making the statement (*x*).

Disclosure of concealed fact before payment by insurer.—If although a material fact were misrepresented or suppressed at the time the

(*p*) *Lindenau* v. *Desborough*, 8 B. & C. 586. *London Assurance* v. *Mansel*, L R 11 Ch D. 369, 48 L. J. Ch. 331, 27 W. R 444.

(*q*) Re *Universal Non-Tariff Fire Insurance, Forbes' claim*, L. R. 19 Eq. 485, 44 L. J. Ch. 761, 23 W. R. 465.

(*r*) *Barsalou* v. *Royal*, 15 Lr. Can. Rep. 1.

(*s*) *Dobson* v. *Sotheby*, 1 Mo. & M 90

(*t*) *British Equitable* v. *Great Western Railway Co*, 20 L. T. N. S. 422, 38 L. J. N. S Ch. 314, 17 W. R. 561.

(*u*) *Trail* v. *Baring*, 4 Giff. 485, 10 L. T. N. S. 215, 33 L. J. Ch. 521, 12 W. R. 678

(*x*) *Duckett* v *Williams*, 2 Cr. & M. 348, 3 L. J. N. S. Ex. 141.

insurance was effected, it was disclosed to the insurance office before the money was paid, so that the payment was made by them with full knowledge of all the facts, the insurers cannot afterwards recover the money back (*y*).

[* 162] **Order for delivery up of policy on ground of fraud.*—The Courts will at the suit of the insurer, order a policy to be delivered up to be cancelled on the ground of fraud in effecting the insurance when the instrument is not void on the face of it; and in such case the plaintiffs have a better equity if they bring their action in the lifetime of the assured than if they wait until after his death (*z*).

Private knowledge of insurer does not affect assured's duty.—The assured cannot lessen his obligation to disclose a fact by speculating on what may or may not be in the mind of the insurer, or as to what may or may not be brought to his mind by the particulars disclosed to him by the assured, if those particulars fall short of the fact which the assured is bound to communicate (*a*).

New policy issued on old application.—If a policy is issued and declared conditional on the truth of an application which does not in fact contain a just and true exposition of all requisite facts respecting the condition of the property, and subsequently a new policy be issued at a reduced premium but without a new application, the new policy will also be conditional on the truth of the old application (*b*).

A room described as a "dwelling house."—When a man has only one room in a house and insures his goods therein, describing the place as the dwelling-house of the assured, he will be entitled to recover even with a condition that the house, buildings, or other places where goods are deposited shall be accurately described, since such description goes to the structure of the house and not to the interest of the assured therein (*c*).

Misdescription of premises.—The building or other place where goods are deposited must be correctly described (*d*). But the

[* 163] *wrong description arising from the act of the insurers or their agent is no defense (*e*) (*).

The condition as to accurate description of premises relates to their construction and not to their tenure (*f*).

Effect of misrepresentation as to part of property insured.—It is usual

(*y*) *Bilbie* v. *Lumbey*, 2 East 469. *Wing* v. *Harvey*, 5 De G. M. & G 265, 23 L. J. Ch. 511, 23 L. T. 120, 18 Jur. 394, 2 W. R. 370.

(*z*) *Fenn* v. *Craig*, 3 Y. & C. Ex. 216, 3 Jur. 22.

(*a*) *Bates* v. *Hewitt*, L. R. 2 Q. B. 595, 606, 36 L. J. Q. B. 282, 15 W. R. 1172.

(*b*) *Martin* v. *Home Insurance Co.*, 20 U. C. (C. P.) 447.

(*c*) *Friedlander* v. *London Assurance*, 1 Mo. &. R. 171.

(*d*) *Casey* v. *Goldsmid*, 2 Lr. Can. Rep. 200, 4 Lr. Can. Rep. 107.

(*e*) *Somers* v. *Athenæum*, 9 Lr. Can. Rep. 61, 3 Lr. Can. Jur. 67. *London, Liverpool and Globe* v. *Wyld*, 1 Canada (S. C.) 604.

(*f*) *Friedlander* v. *London Assurance*, 1 Mo & R. 171.

(*) Where agent knew that buildings insured where not entirely situated on the land of the firm. Held that company was estopped from claiming that policy was avoided. *German Fire Ins. Co.* v. *Carrow*, 21 Ill. Appl. 631.

to stipulate in a policy that misrepresentation as to part of the property insured shall avoid the policy as to such part. In Canada the Courts have been inclined so to hold independently of the condition (*g*). The question seems to turn on the divisibility of the contract. When there are two express subjects of insurance, the house and the goods therein, it is difficult to see on what principle a misrepresentation as to incumbrances on the house should avoid the insurance as regards the house, unless some special (and it would be very harsh) condition were made to that effect (*h*).

Such policies have been held in several cases indivisible, but they contained a stipulation that "the policy," not that the part relating to the building, should be void in the event which happened (*i*). And as the policies in question were not for two distinct considerations (*j*), but for one entire consideration, viz., the premium on house and goods, the Courts, in the absence of a condition that misrepresentation as to part should avoid the policy in part, were unable to assist the assured, saying that where in a policy the risk is distributed between the two subjects, this is merely to limit the liability in respect of each part, *not to [* 164] divide the contract (*k*). Where house and goods were insured in one policy for a gross premium, but separately valued, a misstatement as to the ownership of the house was in New York held fatal to a claim for loss to the house, but it was also held that the contract was divisible, and that the insured could recover the loss to the goods (*l*).

What neither party need mention.—Either party may be innocently silent as to grounds open to *both* to exercise their judgment upon (*m*).

What insured need not mention.—The insured need not mention what the insurer knows, nor what he ought to know, nor what he takes upon himself the knowledge of, nor what he waives being informed of, nor what lessens the risk agreed and understood to be run by the express terms of the policy, nor general topics of speculation, as, for instance, the insurer is bound to know every cause which may occasion natural perils, such as the difficulty of the voyage, the kinds of seasons, the probability of lightning, hurricanes, earthquakes, &c. (*n*).

(*g*) *Butler* v. *Standard Fire*, 4 U. C. (App.) 399. *Russ* v. *Mutual, &c., Co.*, 29 U. C. (Q. B.) 73.

(*h*) *Phillips* v. *Grand River Insurance Co.*, 46 U. C. (Q. B.) 384, per Cameron, J., 363.

(*i*) *Gore District Mutual Fire* v. *Samo*, 2 Canada (S. C.) 411. *Cashman* v. *London and Liverpool Fire*, 5 Allen (New Bruns) 246.

(*j*) *Hopkins* v. *Prescott*, 4 C. B. 578, 591. *Harris* v. *Venables*, L. R. 7 Ex. 235, 240.

(*k*) *Gore District Fire* v. *Samo*, 2 Canada (S. C.) 411, per Ritchie, J., 421, 26 U. C. (C. P.) 465, 1 U C. (App.) 545.

(*l*) *Schuster* v. *Dutchess Ins. Co.*, 102 N. Y. 260.

(*m*) *Carter* v. *Boehm*, 3 Burr. 1910, per Lord Mansfield.

(*n*) Per Lord Mansfield, *Carter* v. *Boehm*, 3 Burr. 1910. *Bates* v. *Hewitt*, L. R. 2 Q. B. 595, 605, 36 L. J. Q. B. 282, 15 W. R. 1172.

[*165] *CHAPTER VIII.

CONDITIONS IN POLICIES.

All policies contain a certain number of conditions declaratory of the terms and limitations under which the policy is granted, and of the duties of the assured, and to some extent imposing duties upon him in excess of those implied by law. Some such conditions are precedent to the effectual making of the contract, and if they are not satisfied, the policy does not take effect at all. Others presuppose the contract made, but are precedent to the accrual of a right to sue thereon. Others declare events in which all right under the contract is forfeited. Others deal with the mode of settling disputes, and others limit the period for bringing a claim (1).

Forfeiture Cy près doctrine not applicable.—The rules as to forfeiture of real estate do not apply to forfeiture under conditions in a policy, and the plain words of the policy must be adhered to and followed, and performance on the *cy près* doctrine will not suffice (*a*).

Condition. Waiver.—Non-performance of a condition contained in a policy makes the policy voidable at the election of the insurers. They may waive the forfeiture, or by their conduct after notice of the breach estop themselves from setting it up. "The word void in a private instrument can rarely if ever exclude the possibility of confirmation" (*b*).

[* 166] **New agreement after breach of condition.*—A new agreement may be relied on either as waiver of a breach of the original contract or as a substituted contract. In this case the question by whom the agreement was made is material, since some agents of a company may have an authority to make new contracts which others have not (*c*).

Mode of waiver.—When a breach of a policy not under seal may

(*a*) *Want* v. *Blunt*, 12 East 183, 187, per Ellenborough, C. J. *Neill* v. *Union Mutual*, 45 U. C. (Q. B.) 591, 609.

(*b*) *Armstrong* v. *Turquand*, 9 Ir. C. L. 32, 45, per Christian, J. *Wing* v *Harvey*, 5 De G. M. 265, 23 L. J. Ch. 511, 23 L. T. 120, 18 Jur. 394, 2 W. R. 370. *Canada Landed Credit Co.* v. *Canada Agricultural Insurance Co.*, 17 Grant (U. C.) 418.

(*c*) *Supple* v. *Cann*, 9 Ir. C. L. 1. *British Industry Co.* v. *Ward*, 17 C. B. 645, 652.

(1) An endorsement on the back of a policy, not being referred to therein, or in the by-laws, is no part of the policy and does not bind the assured. *Planters' Mutual Ins. Co.* v. *Rowland*, 66 Md. 286.

be waived in a particular way, and the insurers would be obliged to waive it if the assured performed the requisite acts, there is nothing to prevent the insurer from waiving the breach in other ways (*d*).

Resolution to pay made in ignorance of breach no waiver.—Where the assured has not disclosed incumbrances on the property insured as required by a condition in the policy, a resolution of the directors of the company to pay a loss under the policy made in ignorance of this breach of condition is no waiver of such breach, and they are free to rescind the resolution and defend the action (*e*).

Compromise in ignorance of facts.—So also, if in ignorance of a fraud avoiding the policy they compromise the claim, they may get the compromise set aside (*e*).

Fire policies. Condition as to misdescription and concealment.—Though by the general principles of insurance law any material misdescription or misstatement of or omission to state facts material to be known for estimating the risk avoids a policy, most fire policies contain an express condition on the subject (*f*).

The 1st condition in a fire policy usually (*g*) declares *that [* 167] misdescription of the building or place to be insured or in which goods to be insured or contained, and any misstatement or omission to state facts material to be known for estimating the risk, shall avoid the policy as to the property affected by such misdescription, misstatement, or omission.

Condition. Misrepresentation.—This condition deals with statements or representations relating to the actual position and character of the premises insured, in order (as the insurers themselves express it) that their agent may form an accurate and sound opinion and judgment of the nature and extent of the risk.

The general law of insurance, independently of the condition, visits any material misrepresentation by totally exempting the insurers from liability, because all that is to be done on one side is the consideration for all that is to be done on the other, all the promises are referred to all the considerations (*h*), but the condition

(*d*) *Supple* v. *Cann*, 9 Ir. C. L. 1.

(*e*) *Stainton* v. *Carron Co.*, 10 Jur. N. S. 873. *Dunnage* v. *White*, 1 Swans. 137. *Phillips* v. *Grand River Fire Mutual Insurance Co.*, 46 U. C. (Q. B.) 334. *Queen Insurance Co.* v. *Devinney*, 25 Grant (U. C.) 294, a very full case. *Hercules Co.* v. *Hunter*, 15 C. S. C. (1st series) 800.

(*f*) *Benson* v. *Ottowa*, 42 U. C. (Q. B.) 282.

(*g*) Such condition usually runs as follows:—"Any material misdescription of any of the property proposed to be hereby insured, or of any buildings in which property to be so insured is contained, and any misstatement of, or omission to state, any fact material to be known for estimating the risk, renders the policy void as to the property affected by such misdescription, misstatement, or omission respectively."

(*h*) Per Bramwell, B., *Harris* v. *Venables*, L. R. 7 Ex. 240. *Williamson* v. *Commercial Union*, 26 U. C. (C. P.) 591. *Pim* v. *Reid*, 6 M. & G. 1, 6 Scott N. R. 982, 12 L. J. C. P. 299.

provides that the misrepresentation shall avoid the policy as to the property affected thereby. It may therefore be contended that under the condition the contract may be treated as divisible, and the benefit therefore be lost to the assured only so far as regards that part of the property affected by the misrepresentation. Such a result would make the operation of the condition more favorable to the assured than that of the Common Law, under which a material misrepresentation would take away the whole benefit of his policy (*i*)

[* 168] *The 2nd provision made by fire conditions is as to the use of the property insured, and provides against increase of the risk after insurance, unless assented to; also that property removed from the place where the risk has been taken to any other shall cease to be covered on such removal (*k*).

User of things insured. Condition as to alteration. Removal.—Policies cease to attach to goods removed both by the general principles of insurance law and a particular condition, which, however, provides that assent or sanction of the insurers may be obtained and indorsed the policy. In some cases the policy even provides for the covering of other goods or risks pending its term.

Suspense of policy during forbidden uses.—In America, conditions are framed dealing specifically with rock oils and volatile oils and burning fluids, forbidding their use and making the insurance ineffectual so long and only so long as the forbidden use continues (*l*). Policies containing such conditions are not avoided, but only suspended during the presence of such articles on the insured premises.

It will be for the insurers to prove the character of the substance in respect of which they claim such exception (*m*).

Inapplicable conditions.—Difficulties may be and have been caused by issuing forms of policy without striking out those conditions indorsed on the policy which are inapplicable to the subject-matter insured, but leaving the question of the application of the

[* 169] conditions to the proviso (if any) *in the body of the policy, "That this policy shall be subject to the several conditions

(*i*) *Cashman* v. *London and Liverpool Co.*, 5 Allen (New Bruns.) 246. *Gore District Mutual Fire* v. *Samo*, 2 Canada (S. C.) 411.

(*k*) Such conditions are usually as follows:—"If after the risk has been undertaken by the insurers anything whereby the risk is increased be done to property, or to or upon or in any building in which property hereby insured is contained, or if any property hereby insured be removed from the place in which it is herein described as being contained, without in each and every of such cases the assent or sanction of the insurers signified by endorsement hereon, the insurance on the property affected thereby ceases to attach."

(*l*) *Putnam* v. *Commonwealth Insurance Co.*, 18 Blatch. (U. S.) 369, and cases there cited.

(*m*) *Buchanan* v. *Exchange Fire Co.*, 61 N. Y. 25. *Mears* v. *Humboldt*, 87 Am. Rep. 647, 92 Penn. St. 15.

and regulations herein and hereon expressed so far as the same are or shall be applicable" (*m*) (*).

Thus a policy framed for buildings was issued to cover a ship. The 7th condition stipulated that if more than twenty pounds of gunpowder should be on "the premises" at the time of a loss, such loss should not be made good. And the Privy Council held that the word "premises" must be taken to mean the ship for the purposes of the said policy, and that the word having a clear legal meaning, viz., "the subject or thing previously expressed," no evidence of usage as to carriage of gunpowder in ships as freight was admissible to show the condition inapplicable to a steamer (*n*).

And if a policy, though improper in form, be accepted by the assured, he must be taken to have read it, and it is just that he should be bound by the proper legal construction thereof.

Increase of risk.—When a business classed in the memorandum on a policy as extra hazardous is carried on after insurance, it will avoid the policy, and the verdict of a jury that it does not increase the risk will be set aside (*o*). It would be otherwise if the fact that the company considered the business extra hazardous was merely in the instructions to agents (*p*).

Change of business.—A change in the nature of the business carried on in the assured's premises, whereby the risk is increased, and without proper notice, avoids the policy (*q*), (*), even where the increased risk is caused by a tenant without his land-
*lord's knowledge (*r*). But it has been held in Canada [* 170] that notice of the change of business to the insurer's agent, without sending in the policy for indorsement, will suffice if there be no condition to the contrary (*s*).

Selling liquor.—Selling liquor by retail has been held in Canada not to be an increase of risk where a policy has been taken out on groceries and patent medicines. But in England spirit-selling is a hazardous trade, and a grocer could not become a licensed or unlicensed retailer of spirits without risking his insurance (*t*).

(*m*) *Grandin* v. *Rochester Co.*, 107 Penns. 26.

(*n*) *Beacon Life and Fire Co.* v. *Gibb*, 1 Moore P. C. N. S. 73, 7 L. T. N. S. 74, 11 W. R. 194, 9 Jur N. S. 185.

(*o*) *Merrick* v. *Provincial Insurance Co.*, 14 U. C. (Q. B.) 439.

(*p*) Same case.

(*q*) *Shaw* v. *Robberds*, 1 N. & P. 279, 6 A. & E. 75, 6 L. J. N. S. K. B. 106.

(*r*) *Long* v. *Beeber*, 51 Am. Rep. 532. *Liverpool and London, &c., Co.* v. *Gunther*, 9 Davis (Sup. Ct. U. S.) 113.

(*s*) *Peck* v. *Phœnix Mutual Insurance Co.*, 45 U. C. (Q. B.) 620.

(*t*) *Nicholson* v. *Phœnix Mutual*, 45 U. C. (Q. B.) 259.

[2] Policy on a hotel, its furniture, &c, excepted "goods held on storage." Held that furniture stored to be used in the business of the hotel was not within the exception. *Continental Insurance Co.* v. *Pruitt*, 65 Texas 125.

[3] Where insurer knows that premises may be used for storing cotton, and the policy stipulates that "when building is used as a warehouse the rate will be changed"; the storing of cotton will not avoid policy. *Steers* v. *Home Ins. Co.*, 38 La. An. 952.

Tavern.—Change of occupation from a private house to a tavern without consent of the insurance company would avoid the policy under the condition against increasing the risk; but a coffee-house tavern after a change to some other equally hazardous business is not a tavern within this rule (*u*); and if the change be to a which the company have allowed, the policy will, it seems, hold good (*x*).

Conditions as to user of thing insured. Shaw v. Robberds.—One of the conditions (3rd) of a policy was that unless the trades carried on be accurately described, and if a kiln or any process of fire-heat be used and not noticed in the policy, the policy was to be void; and another condition (6th) stated that if the risk should be by any means increased, notice was to be given to the office, otherwise the insurance to be void (*y*). The assured lent his kiln, which was used only for drying corn, to another person on one occasion to dry bark, which was more dangerous. *Change of use with increase of risk.*—No notice was given to the insurers, and the kiln was destroyed. It was held that the 3rd condition related to the time of insuring, and that nothing which occurred afterwards [* 171] *could bring the case within that condition, which was fully performed when the risk first attached; that the 6th condition pointed to an alteration of business, permanent and habitual; and if the plaintiff had either dropped his business of corn-drying and taken up that of bark-drying, or added the latter to the former, the case would have been within that condition. But the single act of kindness was no breach of the 6th condition, and the plaintiff was allowed to recover (*z*).

Glen v. *Lewis. Use by way of experiment contrary to condition.*—In *Glen* v. *Lewis* (*a*) the question was whether the placing a small steam-engine on the premises and using it in a heated state to turn a lathe simply for the purpose of ascertaining by the experiment whether it was worth the plaintiff's while to buy it, avoided the policy, having regard to its conditions, one of which was that in case of any alteration in a building insured, or of any steam-engine, &c., or any other description of fire-heat being introduced, or of any trade, business, process, or operation being carried on notice must be given, and every alteration be allowed, &c., otherwise no benefit should arise to the assured in case of loss. Parke, B., in giving judgment, said: "The clause implied that the simple introduction of a steam-engine without fire will not affect the policy, but it will if fire is put to it. It makes no difference whether it is used on trial or as an approved means of carrying on the parties' business, nor does it make any difference that it is used for a longer

(*u*) *Doe d. Pitt* v. *Laming*, 4 Camp. 73.
(*x*) *Campbell* v. *Liverpool and London Fire*, 13 Lr. Can. Jur. 309.
(*y*) See also *Dobson* v. *Sotheby*, 1 M. & M. 90. *Pim* v. *Reid*, 6 M. & G. 1, 12 L. J. C. P. 299, 6 Scott N. R. 982.
(*z*) *Shaw* v. *Robberds*. 1 N. & P. 279, 6 A. & E. 75, 6 L. J. N. S. K. B. 106.
(*a*) 8 Ex. 607, 22 L. J. Ex. 228, 21 L. T. 115, 17 Jur. 842.

or a shorter time. And referring to *Shaw* v. *Robberds*, the learned Baron said: "That case is the only one which approaches the present, and we cannot help feeling that the construction of the policy in that case may have been somewhat influenced by the apparent hardship of avoiding it by reason of the accidental and charitable use of the kiln, the subject of the assurance. If *in that case the condition has been, *inter alia*, that no bark [* 172] should be dried in the kiln without notice to the company, which would have resembled this case, we should have been far from thinking that the Court would have held that the drying which took place did not avoid the policy, by reason of its being an extraordinary occurrence or an act of charity. We are therefore of opinion that the defendant [the insurance company] is entitled to judgment."

Oven.—Building an oven on premises insured, if it be safely built and there is no evidence to show that it increases the risk, will not prevent the assured from recovering the insurance-money (*b*).

Erection of engine.—Where the insured put up an engine in a brick house, and the insurer's agent gave notice that increased premium would be required, and assured applied to his insurers and elsewhere for insurance thereon at enhanced premium and was refused, he was nonsuited, on the ground that the policy was known by him to be void (*c*).

Non-occupation increasing risk.—Leaving the premises unoccupied may increase the risk, and if it does will be within this condition. Whether non-occupation lessens or increases the risk depends on circumstances. The whole question, which does not seem to have arisen here, is very fully considered in a Canadian case (*d*), where the American cases are cited and discussed.[4]

Ceasing to occupy without fraudulent intent has been held in New Brunswick not to come within a condition avoiding the policy in case of increase of *risk through change of occupa- [* 173] tion, unless proof were given that under the circumstances and position of the building it was more liable to destruction when unoccupied (*e*).

Empty house.—Notice of vacancy if required by a condition must

(*b*) *Naughter* v. *Ottawa Agricultural Insurance Co.*, 43 U C. (Q. B.) 121. *Sillem* v. *Thornton*, 3 E. & B. 868, 23 L. T. 187, 18 Jur. 748, 2 W. R 524, 23 L. J. Q. B. 362. *Barett* v. *Jermy*, 3 Ex. 535, 18 L. J. Ex. 215. *Glen* v. *Lewis*, 22 L J. Ex 228, 17 Jur. 842, 8 Ex. 607, 21 L. T. 115. *Stokes* v. *Cox*, 1 H. & N. 533, 26 L. J. Ex 113, 28 L. T. 161, 3 Jur. N. S. 45, 3 W. R. 89.

(*c*) *Reid* v. *Gore District Mutual*, 11 U C. (Q. B.) 845.

(*d*) *Abrahams* v. *Agricultural Insurance Co.*, 40 U. C. (Q. B.) 175. And see *Bennett* v. *Agricultural Co.*, 50 Conn. 420.

(*e*) *Foy* v. *Etna, &c., Co*, 8 Allen (New Bruns, 29.

(*f*) *Canada Agricultural Credit Co.* v. *Canada Mutual Fire Co.*, 17 Grant (U. C.) 418.

[4] Where policy provides that company shall not be liable while "premiums" are unoccupied, if loss occurs while house was unoccupied, except by a few utensils, no recovery can be had, even though the land particularly described in the policy was occupied. *Sexton* v. *Hawkeye Ins. Co.*, 69 Iowa 99.

be given in reasonable time. Three days will not be too long (*f*), [5] [6].

Change of occupancy.—Description of the building insured as a farm-house, the column for the name of the occupants being left blank and the premises being at the time, and remaining until the loss, unoccupied, is no breach of a condition to give notice of a change of occupancy (*g*).

Condition as to disclosing other insurance must be observed.—The importance of being informed of the names of the offices which are jointly interested in a risk is obvious to all who have any acquaintance with the law and practice of insurance, and nothing, therefore, can be more reasonable than that the persons assuring should stipulate for information being given as to the offices in which other insurances are existing or are subsequently taken out; and it is competent for them to stipulate that if any erroneous or untrue representation be made on this point the policy shall be void, and, if they do so, the Courts cannot hold any part of the representation immaterial (*h*). But if they want the information they must stipulate for it (*i*); and failure to disclose it is not fraud (*k*).

Breach of a condition that other insurance shall be notified to the grantor of a particular policy, and notice thereof in-
[* 174] dorsed on the policy or otherwise recognized *by the grantor, is, unless waived, absolutely fatal to any claim on the policy.

The condition can be, of course, broken only by the failure to disclose insurance in companies other than that by which the policy containing it is granted (*l*), and by policies actually on a portion of the same risks (*m*).

Policy accidentally over lapping.—A mere possibility that some portion of the risk covered by both policies might accidentally coincide would not, it seems, constitute such a double insurance as is meant by this condition (*n*). The existence of a marine policy

(*g*) *London and Lancashire Co.* v. *Honey*, 2 Victoria Law 7.

(*h*) *Parsons* v. *Standard Co*, 4 U. C. (App.) 26. *Western Assurance Co.* v. *Attwell*, 2 Lr. Can Jur. 181.

(*i*) *M'Donell* v. *Beacon Fire and Life*, 7 U. C. (C. P.) 308.

(*k*) Similar conditions are found in some English policies, but have not been litigated.

(*l*) *Citizens' Company of Canada* v. *Parsons*, 7 App. Cas. 96, 118.

(*m*) *Australian Agricultural Co.* v. *Saunders*, L. R. 10 C. P. 668, 44 L. J. C. P. 391, 33 L. T. N. S. 447.

(*n*) Per Bramwell, B., in case last cited, L. R. 10 C. P. 674.

[5] Tenant moved on Tuesday and owner took possession on Wednesday, and until Friday evening was engaged in preparing it for occupation, intending to move into it on Saturday. Friday night house burned. Held, that policy was not avoided on the ground of it being vacant or unoccupied. *Eddy* v. *Hawkeye Ins. Co.*, 70 Iowa 472.

[6] Policy insuring hog house, conditioned to be void if premises become vacated by removal of owner or occupant, is not avoided by the fact that use of hog house as such is discontinued. *Kimball* v. *Monarch Ins. Co.*, 70 Iowa 513.

on goods which are landed and warehoused for a special purpose will not vitiate a fire policy made on them by breach of this condition, as the underwriters would not be liable while the goods were so warehoused (*o*).

Condition as to subsequent insurance.—An insurance effected subsequently to the policy sued upon in another company in substitution for a lapsed policy to the like amount in a third company does not avoid the policy sued upon under a condition as to giving notice of a subsequent insurance, if the grantors thereof have had notice of the lapsed policy if existing when their policy was granted or have recognized it if granted after their own (*p*).

Subsequent—further.—Subsequant insurance may be treated as meaning subsequent and further, an addition which seems in accordance with common sense (*p*).

But if the assured takes out a policy in a bad company, in substitution for one lapsed in a good company, some increase of a liability to contribute might arise to other companies.

**Condition against double insurance.*—It has been held in [* 175] Canada that where two insurances were made on the same property with one person, agent of two companies, the companies would not be estopped from setting up the condition vitiating their policies in the case of other insurance, on the ground that the knowledge of the agent could not here be deemed knowledge of the principal (*p*). But if the doctrine laid down in *Blackburn* v. *Vigors* (*q*) is to apply alike to insurer and assured, this Canadian view seems wrong.

Other insurance.—An omission to give the names of other offices in which the applicant is insured will avoid any policy granted on the application where there is a condition to that effect (*r*).

Where it is stipulated that such other insurances must be allowed by indorsement, no action will lie on the policy containing such term till the indorsement has been made, whatever be the equitable remedy, since the indorsement is agreed evidence of the insurer's assent to other insurances (*s*), (†).

Notice of other insurance.—Verbal notice to the insurer's agent will not bind the insurer, and the assured is not entitled to insist upon a reform of the policy by an indorsement of the insurance of

(*o*) *Ibid.*

(*p*) *Parsons* v. *Standard Insurance Co.*, 4 U. C. (App.) 826. *Pacaud* v. *Monarch Insurance Co.*, 1 Lr. Can. Jur. 284.

(*p*) *Shannon* v. *Gore District Mutual*, 2 U. C. (App.) 396.

(*q*) 17 Q. B D. 553.

(*r*) *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 118. *Parsons* v. *Standard Co.*, 4 U. C. (App.) 326.

(*s*) *Noad* v *Provincial Insurance Co.*, 18 U. C. (Q. B.) 584. *Chapman* v. *Lancashire Co.*, 13 Lr. Can. Jur. 86, 2 Stevens Quebec Digest 407 (P. C.).

† Where a condition requires that additional insurance must be consented to in writing, if a waiver is relied upon it must clearly appear that notice was given and indefinite conversation is not sufficient to constitute waiver. *New Orleans Ins. Assn* v. *Griffin*, 66 Tex. 232. *Goldwater* v. *Liverpool, and London, and Globe Ins. Co*, 89 Hun. N. Y. 176.

which he has given merely verbal notice, as this would be compelling their assent, which was *ex hypothesi* in their discretion (*t*), (*).

A consent signed by the secretary has been held to bind the company (*u*), but this must depend upon the authority, actual or constructive, given to the secretary.

[* 176] **Waiver.*—If the company has been informed by the agent of the other insurance, and knowing of it issues a policy, they will be taken to have waived the condition (*x*).

The condition will not be deemed waived if the insurers, on getting notice after the fire, reserve the objection till action brought (*y*).

Mortgagee of mutual policy.—In a mutual insurance company when a policy is assigned, with consent of the insurer, to a mortgagee, though he becomes a member, further insurance by the mortgagor, which the mortgagee did not know of and could stop, will not affect his policy under the condition relating to double insurance (*z*).

Foreign company.—If further insurance be effected in a foreign company, it is still such an insurance as to avoid a policy containing a condition against double insurance, being an insurance in fact (*a*), (*).

Mortgagee.—Insurance made by a mortgagee without the knowledge of the mortgagor will not avoid a policy taken out by the latter and containing such a condition, for the further assurance must be by same person or in the same interest (*b*).

Interim receipt.—Insurance by *interim receipt* may fall within the provision, as, the duration of the interim insurance being limited, the question has been raised whether after expiry of the time limited the assured was entitled to have a policy or not, since if he was it would be a case of other insurance (*c*).

(*t*) *Billington* v. *Provincial Insurance Co.* 2 U. C. (App.) 158, 3 Canada 182.

(*u*) *Attwell* v. *Western*, 2 Lr. Can. Jur. 181. *Soupras* v. *Mutual Insurance Co.*, 1 Lr. Can. Jur. 197, a case of notice given after fire. *Chalmers* v. *Mutual Fire Co.*, 3 Lr. Can. Jur. 2.

(*x*) *Billington* v. *Provincial*, 2 U. C. (App.) 158, 178, 3 Canada 182.

(*y*) *Attwell* v. *Western Insurance Co.*, 2 Lr. Can. Jur. 181.

(*z*) *Mechanics' Benefit Society* v. *Gore District Insurance Co.*, 40 U. C. (Q. B.) 220, 236–8.

(*a*) *Ramsay Cloth Co.* v. *Mutual, &c., Co.*, 11 U. C. (Q. B.) 516.

(*b*) *Gilchrist* v. *Gore District, &c., Co.*, 34 U. C. (Q. B.) 15. *Carpenter* v. *Providence Washington Co*, 16 Peters (U. S.) 501. *Kelly* v. *Liverpool, London and Globe*, 2 Han. (New Bruns.) 266. *Johnson* v. *North British and Mercantile*, 1 Holmes (C. Ct. U. S.) 117.

(*c*) *Hatton* v. *Beacon*, 16 U. C. (Q. B.) 317. *Bruce* v. *Gore District Mutual Co.*, 20 U. C. (C. P.) 207. *Mason* v. *Andes Co.* 23 U. C. (C. P.) 37.

* An applicant told agent that he meant to obtain further insurance in other companies and asked him to so notify the company. Agent replied that it would be needless until such insurance was obtained. Held, that the company was estopped from denying liability, on the ground that its policies forbade additional insurance without its consent. *Kitchen* v. *Hartford Fire Ins. Co.*, 57 Michigan 135.

* There is no double insurance where lessor obtains insurance on a building, and lessee on machinery. *Planters' Mut. Ins. Co.* v. *Rowland*, 66 Md. 236.

*That the assured so thought is evidence as to the *bona* [* 177] *fides* of the assured in his dealings (*d*).

Other insurance on part of property.—If the assured take the benefit of another policy on part of the same premises but not effected by him he will avoid the first policy where notice has not been given (*e*).

Condition against other insurance without notice. Assignee in bankruptcy.—A condition in a policy avoiding it if the assured or his assignee should effect other insurance and not, with reasonable diligence, give notice and have it endorsed on the policy, binds the assignee in bankruptcy of the assured. *Bankruptcy.*—By the bankruptcy he becomes owner of the whole insurance effected by the bankrupt for the benefit of the estate. His subsequent insurance in his own name with another company would, if recoverable, enure to precisely the same interests; and the bankrupt's resulting interest in any surplus of his estates after all debts, &c., are paid would be precisely the same under both policies (*f*).

Who may waive.—Such condition cannot be waived by an ordinary agent where the consent is to be written on the policy (*g*). An inspector, whose duties are to examine into the circumstances, adjust the loss, and settle and report, is not an agent who can give such consent (*h*). He might waive a condition as to a written statement of the loss, that being within the scope of his duties.

Prior to subsequent policy.—Provisions avoiding a policy for not disclosing other insurance apply to other insurance prior or subsequent to that in the policy containing the stipulation. A man may therefore avoid two policies by not giving *notice [* 178] to the grantors of each as to the existence of the other. But in America it has been held that if the assured could never have recovered on the policy of later date the prior policy is not avoided (*i*).

Policies promised but not actually issued.—When a man seeks further insurance and notifies the previous insurance, and his application is accepted and his premium paid, but the policy not issued before a loss occurs, the second insurers cannot object that the policy if issued would have contained a condition against further insurance unless indorsed (*k*), ([10]).

What things covered by policy.—An ordinary fire policy only covers property in which the assured has a beneficial interest, and by its condition excludes property held on trust or commission unless ex-

(*d*) *Greet* v. *Citizens*, 5 U. C. (App.) 596.
(*e*) *Dafoe* v. *Johnstown Mutual District Insurance Co.*, 7 U. C. (C. P.) 55
(*f*) *Jackson* v. *Forster*, 2 E. & E. 463, 29 L. J. Q. B. 8, 33 L. T. 290, 7 W. R. 578. *Schondler* v. *Wake*, 1 Camp. 487. *Dickson* v. *Provincial Insurance Co.*, 24 U. C. (C. P.) 157, 168.
(*g*) *Gale* v. *Lewis*, 9 Q. B. 730, 16 L. J. Q. B. 119.
(*h*) *Mason* v. *Hartford Fire*, 37 U. C. (Q. B.) 437.
(*i*) *Stacey* v. *Franklin Fire*, 2 Watts & Serg. (Penn.) 506.
(*k*) *Baile* v. *St. Joseph Fire Co.*, 73 Missouri 371.
[10] Provision in policy rendering it void in case of other insurance does not apply when the other insurance previously effected was void, because of a violation of condition. *Stevens* v. *Citizens' Ins. Co*, 69 Iowa 658.

pressly described as such (*l*). Sundry articles of household furniture are frequently excluded from insurance, either from their fragility of the difficulty of valuing them, and insurers will not take on any terms risk of destruction of deeds, bonds, bills of exchange, promissory notes, money securities, or books of account. Many persons effecting insurances have not the slightest consciousness that their most valuable household effects, such as pictures, piano, prints, jewels, clocks, and watches, are wholly uncovered, unless specially mentioned, and that the policy does not cover the clothes, &c., of their guests or servants, unless special stipulation be made that to effect ([11]).

[* 179] **Spontaneous combustion.*—The risk of damage to property occasioned by its own spontaneous fermentation or combustion is also excluded by provision. But this condition only affects the particular property in which the spontaneous action arises, and does not remove liability for other goods ignited thereby.

Condition as to interest insured.—Some cases which at first sight seem bailments on trust are by their particular circumstances really transfers for value on special terms as to the mode of settling the accounts between the parties. Where this is so the policy will not be void for not disclosing the nature of the title of the assured, as the property is not held on trust or commission within the meaning of the condition requiring property so held to be specifically insured or described (*m*).

Such is the case with millers receiving wheat from different farmers, which wheat, by the consent of the farmers, was mixed with other wheat and became part of the miller's current stock to grind or to sell, subject to a right in the farmer's at any time (*n*). So also with commission merchants who receive and store grain in elevators and give receipts, but are not bound to do more than deliver a like quantity and quality of wheat (*o*).

Riot. Invasion. Rebellion.—Risk by riot, civil commotion, inva-

(*l*) "This policy does not cover property held on trust or on commission, unless expressly described as such; nor china, glass, looking-glasses, jewels, clocks, watches, trinkets, medals, curiosities, government stamps, prints, paintings, drawings, sculptures, musical, mathematical, or philosophical instruments, patterns, models, or moulds, unless specially mentioned in the policy, nor deeds, bonds, bills of exchange, promissory notes, securities for money or books of account, nor gunpowder, nor loss or damage by fire to property occasioned by its own spontaneous fermentation or heating, or by or through invasion, foreign enemy, riot, civil commotion, or military or usurped power. nor loss or damage by explosion, except loss or damage by explosion of gas in the premises referred to in this policy, not forming part of any gas-works."

(*m*) *South Australian Insurance Co.* v. *Randall*, L. R. 3 P. C. 101, 6 Moore P. C. N. S. 341, 22 L. T. N. S. 843.

(*n*) Same case.

(*o*) *Baxter* v. *Hartford Fire Co.*, 11 Bissell (U. S. Circ. Ct.) 306.

[11] Policy insuring brick store, excepted "fences and other yard fixtures, sidewalks, store furniture and fixtures" held to cover wooden shed or awning in front of building, supported on pillars sunk in ground, with rafters extending into brick wall; but shelving in house, and an office enclosed with railing, are "store fixtures" within the exception. *Commercial Fire Ins. Co.* v. *Allen*, 80 Ala. 571.

sion, foreign enemy, military or usurped power is expressly excepted in most if not all fire policies. Civil commotion is defined by Lord Mansfield as an insurrection of the people for general purposes of mischief not amounting to a rebellion, since no power is usurped (*p*).

Where a party of men came to a coal-mine, fired *shots [* 180] and drove away the watchman, and set fire to premises, this loss was in Pennsylvania held within the exception against riot (*q*). The recent Riot (Damages) Act, 1886 (*r*), gives compensation out of the police rates where a house, ship, or building, in any police district, has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by rioters, and provides (s. 2) that where any person, having sustained such loss, has received, by way of insurance or otherwise, any sum to recoup him in whole or in part for such loss, the compensation payable to him shall, if exceeding such sum, be reduced by the amount thereof, and in any other case shall not be paid to him, and the payer of such sum shall be entitled to compensation as if he had sustained the loss.

Actus Dei.—Earthquakes, hurricanes, forest fires, and fires occasioned to insured property by or during the existence of such contingencies have been in some cases excepted from the risk (*s*).

Condition as to change of title of property.—Policies on house or goods are conditioned to cease to be in force as to any property thereby insured which shall pass from the insured to any person otherwise than by will or operation of law unless notice thereof be given to the insurers ([12]) and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed thereon by or on behalf of the insurers.

The usual condition is as follows: "This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favour of such person be *declared by a memorandum indorsed hereon by or on [* 181] behalf of the company." [13]

Independently of the condition, insurances against fire have

(*p*) *Drinkwater* v. *London Assurance*, 2 Wils. 363. *Langdale* v. *Mason*, 2 Park Ins. 965 (8th ed.). *Mason* v. *Sainsbury*, 3 Doug. 61. *Clarke* v. *Blything*, 2 B. & C. 254.

(*q*) *Lycoming Fire* v. *Schwenk*, 40 Am. Rep. 629, 95 Penn St. 89.

(*r*) 49 & 50 Vict. c. 38.

(*s*) *Commercial Union* v. *Canada Mining, &c., Co.*, 18 Lr. Can. Jur. 80.

(*u*) *Lynch* v. *Dalzell*, 4 Bro. P. C. 431. *Sadlers Co.* v. *Badcock*, 2 Atk 554. As to French law, see *Forgie* v. *Royal Insurance Co.*, 16 Lr. Can. Jur. 34.

[12] Where agent knew of change of membership of firm. Held, to estop insurer from claiming that policy was avoided. *German Fire Ins. Co.* v. *Carrow*, 21 Ill App. 681.

[13] Condition against sale of the property without consent of company, is not vitiated by a sale from one assured to the other, they being co-partners. *New Orleans Ins. Assn.* v. *Holberg*, 64 Miss. 51.

never been assignable as of right like marine policies (*u*). But the particular mode whereby the assent to hold the assign insured shall be testified is purely matter of contract. The conditions are framed to exclude parol consents by agents of the insurer.

Under this condition the policy is good for the insurers or administrators of the insured, and also for a trustee in bankruptcy (*x*), or a liquidator on the winding up of an assured joint-stock company, or it would seem for a continuing partner under an assignment to him by a retiring partner (*y*).

Where freehold property is insured the policy enures to the real and not to the personal representative of the assured (*z*).

If property insured were sold and the contract was complete, but the property not actually in the purchaser's possession although at his risk, the original assured could recover nothing on the policy and the purchaser would be his own insurer. If the property was not paid for, the question of vendor's lien might arise, but if the property had passed from the vendor it is submitted that this condition would preclude him from recovering (*a*).

[* 182] **Bankruptcy.*—When an assured is bankrupt, the property in the policy having passed from him, he is not even a party to an action on the policy, and consequently discovery can not be had from him (*b*).

Effect of execution.—If property were seized and sold under an execution, it would seem that a policy upon such property would not cease to be of force under the condition, as the change of ownership would be due to the operation of law, the judgment and execution (*c*).

A condition is sometimes inserted forfeiting the policy for seizure of goods under an execution or for dispute as to title. But the condition does not operate until there has been a change of possession, as it amounts merely to a stipulation that the policy shall cease to be binding in any case where the property on the goods passes by legal process from the hands of the assured (*d*).

Seizure in execution.—Such a condition is not wholly unjust and unreasonable, for it is always an important matter to the insurers that the goods should be in the custody and ownership of the insured, whose interest alone they insure; and, if they are taken from him, the damage and risk to the insurers are as great, whether

(*x*) *Worsley* v. *Wood*, 6 T. R. 710. *Oldman* v. *Bewicke*, 2 H. Bl 577 note. *Jackson* v. *Forster*, 1 E. & E. 46 [1], 29 L J. Q. B. 8, 33 L. T. 290, 7 W R. 578.

(*y*) *Vide* cases cited in note to *Hathaway* v. *State Insurance Co.* 52 Am. Rep. 438; but see *contrà* the principal case.

(*z*) *Parry* v. *Ashley*, 3 Sim. 97. *Culbertson* v. *Cox*, 43 Am. Rep. 204.

(*a*) *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W R. 547. *Castellain* v. *Preston*, 11 Q. B. D. 396, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557. *New South Wales Bank* v. *North British and Mercantile Co.*, 2 N. S. W. Law 239, 3 N. S. W. Law 60.

(*b*) *Manchester Fire Assurance Co.* v. *Wykes*, 23 W. R. 884, 33 L. T. N. S. 142.

(*c*) *May* v. *Standard Fire Co.*, 5 U. C. (App.) 605.

(*d*) *Ibid.* 609.

they have been taken rightfully or wrongfully. But it is unjust to the assured that the policy should be determinable by the mere wanton or illegal act of another, which the insured may have resisted as far as possible, and which he could not prevent.

But a mere technical levy, which does not increase the hazard of the insurers when the insured remains in full enjoyment of, and has the same power and the *same interest to pre- [* 183] serve the property as before, does not seem within the condition (*e*).

Condition against alienation of property. Assignment of policy.—When a condition is inserted in the policy against alienation of the property, and the policy is assigned by the insured to an assignee not interested in the property, such assignee does not by the assignment, and the assent of the insurers thereto, become the insured under the policy, and the policy still remains liable to be defeated by a breach of the condition by the assignor.

In no case can an assignment of a fire policy be validly made without the insurer's assent (*f*).

Mere notice of transfer will not suffice. Notice cannot compel assent (*g*).

Assignment known to insurers. Waiver of forfeiture.—But if the insurers discover that an assignment has been made under such circumstances as to render the policy void, and on notice of a loss call for and obtain the proofs of loss on the footing of the policy being in full force, they will no longer be at liberty to elect to treat the policy as forfeited, even though the condition be that the policy shall not bind until the assignment is approved (*g*).

Assignment of claim on a policy after loss is not a breach of this condition (*h*). Where a total loss has happened, the policy, and all claim under it, can be effectually and safely assigned. But in cases of partial loss, to assign the policy would avoid it as to the balance of the insurance-money not payable in respect of the particular loss which already occurred (*i*).

**Proceeds of policy hypothecated.*—When a policy is issued [* 184] to one person, the loss or part thereof being made payable to another person or persons as their interest may appear, the last words are in reduction of the amounts specified as payable, and those persons can only claim up to the limit prescribed, even if more is due to them. The balance goes to the assured (*k*).

(*e*) Same case.

(*f*) *Forgie* v. *Royal Insurance Co.*, 16 Lr. Can. Jur. 84. *New South Wales Bank* v. *North British and Mercantile Co.*, 3 N. S. W. Law 60. *Kanady* v. *The Gore District Mutual Fire Co.*, 44 Canada (Q. B.) 261.

(*g*) *Canada Landed Credit Co.* v. *Canada Agricultural Insurance Co.*, 71 Grant (U. C.) 418, 423.

(*h*) *Garden* v. *Ingram*, 23 L. J. Ch. 478. *Waydell* v. *Provincial Insurance Co.*, 21 U. C. (Q. B.) 612. And see *Randall* v. *Lithgow*, 12 Q. B. D. 525.

(*i*) *Kerr* v. *Hastings Mutual*, 41 U. C. (Q. B.) 217.

(*k*) *Dear* v. *Western Assurance Co.*, 41 U. C. (Q. B.) 553.

Benefit of policy not secured by assignment after breach of condition. An insured cannot of course by assignment after condition broken enable a trustee to recover for him what he cannot recover for himself. If the assign held the contract freed from the old conditions, it would amount to a different and less onerous contract than the one assigned. Assent to an assignment does not amount to a waiver of conditions broken, unless such breach is at the time known (*l*). *Mortgagee can't recover for mortgagor who has broken condition.*—Consent with notice of breach is waiver of that breach, where a mortgage is effected, and if necessary assented to by the company; though the mortgagee may be able to recover his mortgage-money, he cannot recover any surplus for the mortgagor if the latter has broken a condition (*m*). This is analogus to the rule in life assurance where the assured mortgages and subsequently commits suicide (*n*).

Limitation of time to sue.—Insurers may lawfully (*o*), and do invariably, limit the time in within which an action may be brought to a period less than that allowed by the Statute of Limitation. It is obvious that to have stale claims made upon them might involve them in considerable difficulties as to the proofs and evi-
[* 185] dence adduced in support *thereof which would not arise if prompt action were insisted on.[14]

Ground thereof.—The true ground on which the clause limiting the time of claim rests and is maintainable is that, by the contract of the parties, the right to indemnity in case of loss and the liability of the company therefor do not become absolute unless the remedy is sought within the year. The stipulation goes to the right as well as the remedy. The clause contemplates a loss about which a contest arises or may arise between the assured and the company, and in respect to which the right to indemnity may be denied. The object was not to foreclose it and prevent a resort to the proper tribunal, but to compel a speedy resort and a termination of the controversy while the facts were fresh in the recollection of the parties, and witnesses and the proofs accessible (*p*).

(*l*) *Wing* v. *Harvey*, 23 L. J. Ch. 511, 5 De G. M. & G. 265, 18 Jur. 394, 23 L. T. 120, 2 W. R. 370.

(*m*) *Oxford Building Society* v. *Waterloo Mutual Fire Insurance Co.*, 42 U. C. (Q. B.) 181.

(*n*) *Solicitors, &c., Co.* v. *Lamb*. 2 De G. J. & S. 250, affirming same case 1 H. & M. 716, 33 L. J. Ch. 426, 10 L. N. T. S. 702, 10 Jur. N. S. 739, 12 W. R. 941, followed in *City Bank* v. *Sovereign Co.*, 32 W. R. 657.

(*o*) *Grieve* v. *Northern Assurance Co.*, 5 Victoria L. R. 443. The Courts of some American States have held otherwise, so also in Lower Canada, *Wilson* v. *State Fire*, 7 Lr Can. Jur. 223.

(*p*) *Cray* v. *Hartford Fire*, 1 Blatch. (U. S.) 280. *Steen* v. *Niagara Fire Co.*, 42 Am. Rep. 297.

[14] Where agent of company induces assured to forbear bringing suit within the time limited by policy, the company waives the limitation. *Bish* v. *Hawkeye Ins. Co.*, 60 Iowa, 184.

Also where company offers to pay specific sum, less than that claimed, it waives right to require preliminary proofs of loss as a pre-requisite to right to sue in less than six days. *Commercial Fire Ins. Co.* v. *Allen*, 80 Ala. 571.

Time varies.—The time limited by the condition varies. It is reckoned by days or months (*i. e.*, calendar months) (*q*), but usually does not exceed twelve months from the date of the loss or refusal and rejection of a claim made under the policy. To make the condition effectual against the assured, it must be pleaded as a defence like the Statute of Limitations itself (*r*), and it has a like effect.

Decree for payment of insurance-money without grant of policy.—If the policy ought to have been, but has not been, issued, and a decree is made for payment by the insurer on the footing of the policy having been actually issued, the insurer cannot avail himself of the condition as to limitation of the time for suing, the action to compel grant of a policy not being an action on the policy (*s*).

Effect of limiting condition.—Where the covenant by the insurers is to pay a certain time after the loss, the real period within which *the assured could sue may, by the limiting condi- [* 186] tion, be virtually reduced to the interval between the day at which payment ought to be made and the last day of the period within which action must by the condition be brought (*t*), since the time for bringing the action in the absence of special terms will run from the happening of the event insured against, but the insured will not know until after the time given to the company to pay whether they intend to settle the claim or make it necessary for him to sue them. And where proofs of loss are received within a reasonable time, before the expiration of the period fixed by the policy for suing, the company cannot cut off the right to sue by withholding its decision upon the proofs until that period has expired, even though the time allowed for examining the proofs would have consumed it (*u*).

The insured is in a somewhat better position where, as in some policies, his time runs alternatively from the loss or refusal of the company to pay. The same rule holds in the case of re-insurance, for the loss or damage is the injury, not the payment of the loss, and an action brought within twelve months of payment, but more than twelve months from the loss against a re-insurer, has on this ground been held too late (*x*).

Notice of loss to be given to company.—Fire policies also contain a further proviso, running as follows:—"On the happening of any loss or damage by fire to any of the property hereby insured, the insured is forthwith to give notice in writing thereof to the company [15], and within fifteen days at latest to deliver to the com-

(*q*) *Pomares* v *Provincial Insurance Co.*, Steven's Digest (New Bruns.) 237 (1873). *Cornell* v. *Liverpool and London*, 14 Lr. Can. Jur. 256.
(*r*) *Lambkin* v. *Western Assurance Co*, 18 U. C (Q. B.) 237.
(*s*) *Penley* v. *Beacon Insurance Co.*, 7 Grant (U. C.) 130
(*t*) See, however, *Lambkin* v. *Western*, 12 U. C. (Q. B.) 361.
(*u*) *Chambers* v. *Atlas Insurance Co*, 50 Am Rep. 1, 51 Conn. Rep. 17.
(*x*) *Provincial Co.* v. *Etna Co.*, 16 U. C. (Q. B.) 135.
[15] Giving notice of loss and rendering particular account required by the policy to resident agent of foreign insurance company, is notice to the company. *North British & M. Ins. Co* v. *Crutchfield*, 108 Ind. 278.

pany a claim for any loss or damage, containing as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by fire, with the estimated [* 187] value of each * of them respectively, having regard to their several values at the time of the fire, and in support thereof to give all such vouchers (*y*), proofs and explanations as may be reasonably required, together with, if required, a statutory declaration of the truth of the account; and in default thereof no claim in respect of such loss or damage shall be payable until such notice, accounts, proofs and explanations respectively shall have been given and produced, and such statutory declaration, if required, shall have been made."

Preliminary proofs, &c.—The legality of this condition is well established. "It has long been the practice of companies insuring against fire, for the purpose of their own security, to incorporate in their policies by reference to their proposals various stipulations for matters to be done by the assured making a claim before the company is to pay him, and (as the remedy by action for not complying with this stipulation could not afford them any protection) to make the fulfilment of those conditions a condition precedent to pay. There was much controversy on the subject about a century ago, but since the case of *Worsley* v. *Wood* (*z*) it has been settled law that this mode of protecting themselves is effectual" (*a*).

Preliminary proofs are required for the benefit solely of the insurer, in order that he may ascertain the nature, extent and character of the loss, and, the condition in the policy in respect thereof being inserted for his benefit, there is no reason why he may not waive or extend the time in which the proofs are to be furnished, nor is it necessary to prove an express agreement to waive (*b*), [16].

[* 188] **Condition as to notice of loss.*—The insured must immediately upon a loss give notice to insurers thereof [17]. In London the same duty devolves by statute on the fire brigade when they have knowledge of a fire. But the condition applies irrespective of place or the magnitude of the fire or damage done, and many minor fires only doing slight damage, and to extinguish which the

(*y*) *Cinq Mars* v. *Equitable*, 15 U. C. (Q. B.) 143, 246.

(*z*) *Worsley* v. *Wood*, 6 T. R. 710. See also *Brown* v. *London Assurance* 40 Hun. (N. Y.) 101.

(*a*) *London Guarantee Co.* v. *Fearnley*, 5 App. Cas. 911, 915, 43 L. T. N. S. 390, 28 W. R. 898.

(*b*) See *Edwards* v. *Travellers' Ins. Co.*, 22 Blatch. (U. S. Circ. Ct.) 228, as to the view which the Courts take these conditions as to proofs, notices, &c.

[16] An agent, having authority to adjust loss, tells assured, after an examination, that nothing further is required, there is a waiver of further preliminary proofs of loss, although clause of policy states that agent has no power to waive condition. *Indiana Ins. Co.* v. *Capehart*, 108 Ind. 270.

[17] Provision of policy, requiring notice of a loss, may be waived by an agent who has authority to adjust losses, even though policy provides that it shall not be bound by the acts of its agents. *Stevens* v. *Citizens Ins. Co.*, 69 Iowa 658.

fire engines are not needed, come within the condition. The duty of the fire brigade does not affect the contract between the parties.

Time for giving notice.—"Immediately" or "forthwith" means within a reasonable time and without any unjustifiable delay (*a*), and reasonable time has been held in New York to be a matter for the Court (*b*). Due diligence will be required in the notification even when the insurance is on interim receipt. Notices given eleven (*c*), or eighteen (*d*), days after the fire have been held too late, but one given five days after the fire, one of such days being Sunday, has been held in time by American Courts (*e*). *To whom to be given.*—But notice to a local agent, it seems, will not do, unless he is specially named as the proper person to receive it; and if the particular number of days is named, the notice must be given within that time (*f*).

Notice of loss. Presumption of delivery.—Where a policy requires notice of loss to be given forthwith by the assured to the assurer and is silent as to the mode of service, the insurer will be presumed to have received the notice, if it be proved to have been properly addressed and posted, since the post is the natural and obvious mode of communication in matters of business, especially when assured and assurer reside in different places (*g*). And in America the *presumption has been held to be based on [* 189] the governmental organization and conduct of the public mail service rendered efficient through sworn officers, and on common experience as to the due transmission and delivery of matter entrusted to the post (*f*). The same rule applies to proofs (*f*). It has been held in Canada that the insurer must object at once to defects or lateness of notice (*g*), but in some American States a different view obtains (*h*). If, however, the silence of the insurer misleads the assured and prejudices his claim, the insurer will in such case be held to have waived his right to notice or proof, or will be estopped from disputing that they were delivered in due time.

Preliminary notice. Agent's adjustment.—Unless the insurer can show fraud, he will be precluded by his agent's adjustment of a loss from denying that he had proper notice thereof (*i*). But if

(*a*) *Rokes* v. *Amazon Insurance Co.*, 51 Maryland 512. *Cashau* v. *North-Western National Insurance Co.*, 5 Bissell (C. Ct. U. S.) 476.
(*b*) *Brown* v. *London Assurance*, 40 Hun. (N. Y.) 101.
(*c*) *Goodwin* v. *Lancashire Fire*, 18 Lr. Can. Jur. 1.
(*d*) *Trask* v. *Insurance Co.*, 29 Penn. 198. *Edwards* v. *Insurance Co.*, 75 Penn. 378.
(*e*) *Griffey* v. *New York Central Co.*, 58 Am. Rep. 202, 55 Sickell (N. Y.) 417.
(*f*) *Patton* v. *Employers' Liability Co*, 20 L. R. Ir. 93.
(*g*) *Susquehanna Insurance Co.* v. *Toy Co.*, 97 Penn. 424, 39 Am. Rep. 816.
(*f*) See *Bell* v. *Lycoming Co*, 19 Hun. (26 N. Y. Sup. Ct.) 288.
(*g*) *Wiggins* v. *Queen Insurance Co.*, 13 Lr Can. Jur. 141
(*h*) *Brown* v. *London Assurance*, 40 Hun. (N. Y.) 107. *Cornett* v. *Phœnix Co*, 67 Iowa 388.
(*i*) *Home Insurance Co.* v. *Myer*, 93 Illinois 271; but see *M'Kean* v. *Commercial Union*, 5 P. & B. (New Bruns.) 588.

the insurer's agent by fraud obtains a settlement, the assured can get it set aside (*j*).

Limitation operates though assured in prison at time of fire.—The contractual limitation will not be extended on the ground that the assured was in prison at the time of the loss, and so continued until his death, and that his creditors began the action within a reasonable time thereafter (*k*).

Proof.—Of the elaborateness of some conditions as to proofs, no better example can be given than that in the Canadian case of *Smith* v. *Commercial Union* (*l*), characterized in the judgment as of wonderful structure and scope, and as calculated to give the assured twelve months' hard work—three months being the limit allowed him to make out his proofs (*m*), ([18]), ([19]).

[* 190] **Particulars of loss. When to be delivered.*—The account of loss is usually conditioned to be delivered within fifteen days at latest, and such condition is reasonable in substance. Otherwise the assured might lie by and spring a stale claim on the insurers at a time when they could not investigate it. Sometimes three months are given for the account (*n*). *Construction of condition.*—The condition will not be strictly construed (*o*). It means that the assured is within a convenient time after the loss to produce to insurers something which enable them to judge whether he has sustained a loss or no, and, if from any cause it is impossible to give the preliminary proof within the time, it would seem (and it certainly is just) that reasonable time should be allowed (*p*). The assured, of course, cannot be expected to give notice till he knows himself, and if he is away at the time of fire no objection can be taken on the ground of any delay caused by such absence (*q*).

Delay in notice suspends claim.—And the condition is here usually so drawn as not to forfeit the insurance for delay beyond the fifteen days, but only to suspend all claim under the policy "until the required notices, accounts, proofs, and explanations are given in."

(*j*) *McLean* v. *Equitable*, 50 Am. Rep. 779.

(*k*) *Tallman* v. *Mutual Fire Co.*, 27 U. C. (Q. B.) 100.

(*l*) 33 U. C. (Q. B) 69, 89.

(*m*) See also in *Bowes* v. *National*, 4 P. & B. (New Bruns) 437.

(*n*) *Roper* v. *Lendon*, 1 E. & E. 825, 5 Jur. N. S 491, 28 L. J. Q. B. 260, 7 W. R. 441.

(*o*) *Mason* v. *Harvey*, 8 Ex. 819, 22 L. J. Ex. 336, 21 L. T. 158. *Dill* v. *Quebec Assurance Co.*, 1 Revue légale (Lr. Can) 113, Lr. Can. Civil Code, 2478.

(*p*) *Scott* v. *Phœnix*, Stuart (Lr. Can.) 354 (P. C.). See *Bowes* v. *National*, 4 P. & B. (New Bruns.) 437. *Dill* v. *Quebec Assurance Co.*, above cited, 1 Revue légale (Lr. Can.) 113, Lr. Can. Code, 2490–2569.

(*q*) *Smith* v. *Queen Insurance Co.*, 1 Han. (New Bruns.) 311.

[18] Provision in a policy that in case of loss copies of all policies must be furnished requires a substantial and reasonable, and not a literal compliance. *Miller* v. *Hartford Fire Ins. Co.*, 70 Iowa 704.

[19] If proofs of loss are reasonably certain it is enough. The precision in pleading is not necessary. *Erwin* v. *Springfield F. & M. Ins. Co.*, 24 Mo. App. 145.

If these words are in the policy the condition is still precedent (*r*), but these words enlarge the time beyond the fifteen days. *Statement of loss.*—Consequently till the statement is made and the statutory declaration, if required, made also, the money is under the condition not payable, and the time of payment not come.
So that though the right of action *may not be lost, it will be [* 191] suspended till the condition is complied with (*s*).

Meaning of "full particulars."—"Full particulars" means "the best particulars which the assured can reasonably give," and the latter phrase is in some policies substituted for the former. If the proviso were more strictly construed, inadvertent omissions of losses or insertions of things not lost would defeat the claim of the assured (*t*).

Condition as to verification of loss. False statement as to title not within it.—When a condition only requires verification of the statement of loss, false statements as to title and incumbrances cannot be relied on as avoiding the policy under this condition (*u*).

Certificate of magistrate.—The conditions still found in American and colonial policies (*x*) requiring the certificate of a magistrate seem to have long since fallen out of use in this country (*y*), and only come before English lawyers in colonial appeals. Where they are used, no claim for indemnity can be made until a proper certificate has been furnished (*z*).

Old form of condition.—The purpose of the old condition as to the certificate of magistrate, clergyman, churchwardens, and other reputable inhabitants was that persons holding public positions in the neighbourhood, and who were therefore to be deemed responsible and substantial, might give the office their opinion on the character of the fire and loss, and thereby afford the office some protection from fraud (*a*).

Refusal of certificate.—Refusal of such certificate will not [* 192] affect the insurers. The assured cannot compel the grant of such certificate (*b*), he cannot substitute other persons for those stipulated (*c*), and, having undertaken for the act of a stranger can not succeed unless that act is done (*d*). But there may be cases in

(*r*) *Weir* v. *Northern*, 4 L. R. Ir. 689. *Lafarge* v. *Liverpool, London and Globe*, 17 Lr. Can. Jur. 237.
(*s*) *Oldman* v. *Bewicke*, 1 H. Bl. 577 note (1786). *Worsley* v. *Wood*, 6 T. R. 710 (1796). *Mason* v. *Harvey*, 8 Ex. 819, 22 L. J. 336, 21 L. T. 158.
(*t*) *Mason* v. *Harvey*, 8 Ex. 819, 820, 22 L. J. Ex. 336, 21 L. T. 158.
(*u*) *Ross* v. *Commercial Union*, 26 U. C. (Q. B.) 552.
(*x*) *Supra*. And see *Logan* v. *Commercial Union*, 6 R. & G. (Nov. Sco.) 309.
(*y*) This disposes of cases like *Routledge* v. *Burrell*, 1 H. Bl. 255, and *Oldman* v. *Bewicke*, 3 H. Bl. 577 note.
(*z*) *Worsley* v. *Wood*, 6 T. R. 710. *M'Rosie* v. *Provincial Insurance Co.*, 34 U. C. (Q. B.) 55. *Kerr* v. *British American Assurance Co*, 32 U. C. (Q. B.) 569. *Daniels* v. *Equitable Co.*, 50 Conn. 551.
(*a*) *Worsley* v. *Wood*, 6 T. R. 710, per Lawrence, J.
(*b*) *Worsley* v. *Wood*, 6 T. R. 722, per Lawrence, J.
(*c*) P. 721, per Grose, J. *Campbell* v. *French*, 6 T. R. 200.
(*d*) P. 720, per Grose, J. *Racine* v *Equitable*, 6 Lr. Can. Jur. 89.

which the Courts will hold the condition substantially complied with, provided, of course, that the right persons certify.

Contents of certificate.—The certificate must state—

(1) That the magistrate is not interested.

(2) That he has examined the circumstances attending the fire, &c.

(3) That he knows the character of the assured.

(4) That he believes the fire to have happened without fraud or evil practice on the part of the assured.

(5) That the claimant under the policy, if different from the assured, has sustained damage in (*e*) respect of matters covered by the policy.

(6) The amount of loss which is believed to have taken place (*f*).

Person certifying must be disinterested.—The magistrate must not have suffered by the fire, nor have any interest in the property damaged, nor be interested in the insurance company (*g*), nor be a creditor or relation of the assured (*h*).

A coroner has in Canada been held to be a magistrate within the condition (*i*).

[* 193] **Affidavit of loss.*—In the older policies an affidavit used to be required. But now the policy merely binds the assured to make a statutory declaration if required, vouching the truth of his statements as to loss, value, &c. The affidavit must be in proper form (*j*) or as stipulated (*k*). This must be *bonâ fide* demanded for any defence to be rested on its not being supplied (*l*).

Preliminary proofs.—Such stipulations as to proof do not touch the substance of the contract, but relate only to the form or mode of ascertaining and proving the liability of the insurer; and the proofs may be submitted to the officers of the insurance company, who must give an opinion on their sufficiency in the ordinary scope of their employment (*m*), (20).

Omission to make the formal preliminary proof of loss required by a policy may be waived by the officers of an insurance company. Such waiver may be express or implied, and will be implied from

(*e*) *Kerr* v. *British American Assurance Co.*, 32 U. C. (Q. B.) 569.

(*f*) *Scott* v. *Phœnix Co.*, Stuart (Lr. Can.) 152, 854 (P. C.).

(*g*) *M'Rosie* v. *Provincial Insurance Co.*, 34 U. C. (Q. B.) 55, where the magistrate was landlord.

(*h*) *Daniels* v. *Equitable Co.*, 50 Conn. 551.

(*i*) *Kerr* v. *British American Co.*, 32 U. C. (Q. B.) 569.

(*j*) *Shaw* v. *St. Lawrence County Mutual Fire Insurance Co.*, 11 U. C. (Q. B.) 78.

(*k*) *Langel* v. *Mutual Insurance Co.*, 17 U. C. (Q. B.) 524. *Mann* v. *Western*, 17 U. C. (Q. B.) 190.

(*l*) *Cameron* v. *Times and Beacon*, 7 U. C. (C. P.) 234.

(*m*) *Priest* v. *Citizens' Mutual*, 85 Mass. (3 Allen) 603.

[20] It is the duty of insurance company, upon finding proofs of loss objectionable, to return the same informing assured of the particular defects. A general reply that they do not correspond with printed instructions, and refusal to receive them, will not avail the company. *Universal Fire Ins. Co.* v. *Black*, 109 Pa. St. 535.

omission to state their objection to the preliminary proofs and refusing to pay on other grounds (*n*).

Proofs must be sent in within prescribed time.—Where a condition of a fire policy requires the making and furnishing of proofs of loss within a specified time, and declares that until they are furnished the loss shall not be payable, the time is a material part of the condition, and consequently, in the absence of waiver, the assured cannot recover unless he sends in the proper proofs within the prescribed time (*o*), ([21]).

**Waiver of condition as to proofs.*—Mere silence as to proofs [* 194] sent in after the time limited by the conditions does not amount to a waiver of the condition, nor does a declaration then made that the company does not consider itself liable amount to a waiver (*p*).

Proof may be given of loss besides that in account delivered to company. Where a detailed account of loss sustained by the fire is delivered in compliance with a stipulation in the policy, the plaintiff is not precluded from giving evidence of the loss of property not specified in the account (*q*), ([22]).

Time for payment runs from completion of proofs.—The time allowed by the condition for payment of the insurance-money by the company runs from the time the insured puts in the proofs on which he relies (*r*).

Waiver.—Waiver may be inferred from the acts and conduct of the insurer inconsistent with any intention to insist on the strict performance of the condition (*s*), ([23]).

Where proofs unnecessary.—Where an insurance company repudi-

(*n*) *Pim* v. *Reid*, 6 M. & G. 1, 12 L. J. C. P. 299, 6 Scott N. R. 982. *Underhill* v. *Agawam Insurance Co.*, 60 Mass. (6 Cush.) 440. *Priest* v. *Citizens' Mutual Fire*, 85 Mass. (3 Allen) 602. *Lambkin* v. *Ontario Marine and Fire*, 12 U. C. (Q. B.) 578. *Whyte* v. *Western Insurance Co.*, 22 Lr. Can. Jur. 215 (P. C.). *Knickerbocker, &c., Co.* v. *Pendleton*, 5 Davis (Sup. Ct. U. S.) 696, 709. *Gauche* v. *London and Lancashire Co*, 4 Woods (U. S. Circ. Ct.) 102.

(*o*) *Whyte* v. *Western Co.*, 22 Lr. Can. Jur. 215 (P. C.).

(*p*) *Whyte* v. *Western Co.* (in Privy Council, reported 22 Lr. Can Jur. 215. *Abrahams* v. *Agricultural Mutual Fire Co.*, 40 U. C. (Q. B.) 175, 180. See *Lancashire Co.* v. *Chapman*, (P. C., reported in 7 Revue légale (Lr. Can.) 47.

(*q*) *Vance* v. *Forster*, Ir. Circ. Rep. 47.

(*r*) See *Rice* v. *Provincial*, 7 U. C. (C. P.) 548. *Hatton* v. *Provincial*, 7 U. C. (C. P.) 555. *Cameron* v. *Monarch*, 7 U. C. (C. P.) 212.

(*s*) *Rokes* v. *Amazon Insurance Co*, 51 Maryland 512, and cases there cited.

[21] Where no time is required in which to furnish proofs of loss, they may be furnished within a reasonable time, according to circumstances. *Miller* v. *Hartford Fire Ins. Co.*, 70 Iowa 704.

[22] If company refused to act upon proofs of loss and repudiated liability, insured is not estopped, by the proofs, from recovering a larger amount. *Sibley* v. *Prescott Ins. Co.*, 57 Mich. 14.

[23] Where insurance company received proofs of loss without making objection. Held, that insurer waived defects. *Eliot Five Cents Saving Bank* v. *Commercial Union Assurance Co.*, 142 Mass. 142. *Susquehanna Mut. Fire. Ins Co.* v. *Cusick*, 109 Pa. St. 157. *Parks* v. *Phœnix Ins. Co.*, 26 Mo. App 537. *Erwin* v. *Springfield F. & M. Ins. Co.*, 24 Mo. App. 145.

ates an insurance and has not signed a policy, preliminary proofs are needless (*t*), ([24]), ([25]).

Estimate of amount.—The assured may have to give in a valuation of what he has lost under the condition as to particulars. Whether so stipulated or not, he cannot recover for more than the worth at the time of the fire, and it is usually stipulated that he shall so value (*u*).

Price.—In the case of furniture cost price might assist in [*195] arriving at, but would not be, the proper estimate. *In the case of stock-in-trade, the market price (*v*), and not the cost price or intrinsic value would seem to be the proper value. But the cost of manufacturing goods may be given in evidence to aid the jury in determining the fair market-value (*w*). Naturally goods long in stock would not be estimated at cost but at sale price, and it would only seem fair to take the same test for goods recently acquired and in full condition and favour with the public. The rule cuts both ways when prices are depressed (*x*).

Mistake in proofs as to cause of fire.—Error as to the cause of fire (made without fraud) in the preliminary proofs may be corrected and the insurer made liable by proof of the true cause (*y*). Innocent misstatement is not within the condition (*z*).

Acceptance of.—If the insurers admit a policy and agree to try the cause and manner of the loss, they cannot take any objection on the policy as to the propriety of the notices and proof (*a*).

Estimate must be detailed.—The damage must not be lumped, but given in detail. Even if not so stipulated, the assured would be liable to deliver particulars giving a detailed account of the several items making the sum total of his loss.

A fraudulent overcharge will of course avoid the policy. The condition relating thereto is no mere threat (*b*).

Vouchers.—Vouchers, proofs, and explanations are required as much by good faith as by the conditions, and a man who would

(*t*) *Goodwin* v. *Lancashire Fire*, 18 Lr. Can. Jur. 1.

(*u*) As to evidence admissible in proof of value, see *Clement* v. *British American Ins. Co.*, 141 Mass. 298.

(*v*) *Equitable Co.* v *Quinn*, 11 Lr. Can. Rep. 170.

(*w*) *Clement* v. *British American Co.*, 141 Mass. at p. 301. *Mack* v. *Lancashire Co.*, 2 McCrary (U. S. Circ. Ct.) 211

(*x*) *M'Cuaig* v. *Quaker City Co.*, 18 U. C. (Q. B.) 130.

(*y*) *Smiley* v. *Citizens' Fire* 14 West Virginia 33. *Meagher* v. *London and Lancashire Fire*, 7 Victoria L. R. 390.

(*z*) *Titus* v. *Glen Falls Co.*, 81 N. Y. 412, 421.

(*a*) *Walker* v. *Western*, 18 U. C. (Q. B.) 19.

(*b*) *Thomas* v. *Times and Beacon*, 3 Lr. Can. Jur. 162.

[24] Proof of loss or objection to form of proof is waived when company basis its refusal to pay on other grounds *Grange Mill Co.* v. *Western Assurance Co.*, 118 Ill. 396. *Continental Life Ins. Co.* v. *Rogers*, 119 Ill. 474.

[25] An unqualified refusal to pay loss is a waiver of proof of loss even though statute and contract require such proof. *Boyd* v. *Cedar Rapids Ins. Co.*, 70 Iowa 325.

not show his accounts would have as little chance of recovering under the Common Law as under an ordinary policy.

Where the assured refused to produce invoices demanded [196] by the insurers under a condition as to vouchers, &c., it was held that he must be nonsuited (*c*). Vouchers of course will include books of account if any are kept. And where the assured has insured a certain sum on stock-in-trade and has been trading for some months, the insurers are reasonably justified within this condition in calling for such proof as the assured can furnish, that after deducting the goods saved and the goods sold he still had in stock such further amount of goods as would make his loss amount to the full sum insured (*d*) or claimed under the policy.

Proof of loss. What may be required.—A builder's certificate as to the value of the house at the time of fire may reasonably be required under this condition, and must be supplied, if required, before action brought (*e*).

Omission to verify if so required by books of account or other proper vouchers is fatal unless the conditions are literally or substantially complied with (*f*) in those cases where the man has such means of verification.

If the books, &c., are burnt, the assured must supply a particular account, if any means of so doing still remain (*g*).

A mere affidavit of value with accounts of goods sold to the assured, and having only charges of goods per invoice without particulars, will not suffice (*h*).

**False statement. Agent's knowledge of facts.*—A false state- [* 197] ment made by the insured cannot be excused by knowledge of the truth possessed by a local agent receiving the application, whether such false statement be made in the application or the proofs of loss. In the latter case, the liability having accrued, the question of waiver would not arise (*i*).

Ascertainment, &c., loss. Condition precedent.—Ascertainment and proof or adjustment of the loss may be made a condition precedent to the right to sue for the loss, and it is a good defence to an action that the loss has not been ascertained and proved (*k*). The mode of proof, &c., need not be pleaded, being matter of evidence only.

"*Satisfactory.*"—Proof satisfactory to the company means proof

(*c*) *Cinq Mars* v. *Equitable Insurance Co.*, 15 U. C. (Q. B.) 143, 246.
(*d*) *Ibid.*, 246, per Robinson, C. J.
(*e*) *Fawcett* v. *Liverpool, London, and Globe*, 27 U. C. (Q. B.) 225.
(*f*) *Greaves* v. *Niagara District Mutual Fire Insurance Co.*, 25 U. C. (Q. B.) 127. *Scott* v. *Niagara District*, 25 U. C. (Q. B.) 123. *Banting* v. *Niagara District Mutual Fire Insurance Co.*, 25 U. C. (Q. B.) 431.
(*g*) *Carters* v. *Same*, 19 U. C. (C. P.) 143
(*h*) *Mulvey* v. *Gore District Mutual Fire Insurance Co*, 25 U. C. (Q. B.) 424.
(*i*) *Hansen* v. *American Insurance Co.*, 57 Iowa 741
(*k*) *Elliot* v. *Royal Exchange*, L. R. 2 Ex. 237, 36 L. J. Ex. 129, 16 L T. N. S. 399, 15 W R. 907. See also *M'Manus* v. *Etna Co.*, 6 Allen (New Bruns) 314. *Johnston* v. *Western*, 4 U. C. (App.) 281. *Lambkin* v. *Western*, 13 U. C. (Q B.) 237. *Waydell* v. *Provincial*, 21 U. C. (Q. B.) 612. *London and Lancashire* v. *Honey*, 2 Victoria L. R. 7.

which ought to be or in the opinion of a court of justice is satisfactory (*l*).

Valuation. Fraud. Excessive valuation.—If the assured does not reasonably and actually believe in the valuation put on his goods in his proof, he will forfeit all claim under the condition as to fraud (*m*). And if a jury find a verdict for an amount very much less than the claim, the judgment will either be entered for the insurers (*n*) on the ground that the assured has been guilty of fraud in his valuation, and so avoided the policy within the condition, or a new trial will be ordered (*o*). It does not seem clear how much less the finding must be than the valuation for the policy to be avoided on the ground of fraud, and no decision seems to have been given [* 198] on that *point in England except *Levy* v. *Baillie*, where the claim was £1085 and the verdict for £500 (*p*). In Novia Scotia, in a case where the verdict was for $3000 but many witnesses valued the property at $500, the verdict was set aside (*q*). But in another, where $840 was claimed and $600 awarded, the verdict was upheld because the effect of the finding of the jury was to negative fraud (*r*). *Over-value.*—So also in Ontario, where it was said that it not appearing that an over-valuation was made *malâ fide*, but by error of judgment, the Court will not set aside a verdict, the question of fraud being for the jury (*s*).

Over-valuation not fraudulent.—Over-valuation in an application, if not fraudulent, will not avoid a policy (*t*).

Condition as to fraud in claim, or criminal procurement of fire.—The condition as to fraud in the claim runs as follows:—"If the claim be in any respect fraudulent, or if any statement or statutory declaration made in support thereof be false, or if the fire was caused by or through the wilful act, procurement, or connivance of the insured or any claimant, all benefit under this policy is forfeited."

This condition imposes no duty as to diligence in saving the goods endangered by a fire, but deals only with arson or procurement thereof. In London the rescue of property is generally undertaken by the salvage corps, and the goods are at insurer's risk from the outbreak of the fire. In America and the colonies [* 199] efforts are made by many if not all insurers to make *the

(*l*) *London Guarantee Co.* v. *Fearnley*, 5 App. Cas. 911, 43 L. T. N. S. 390, 28 W. R 893. *Manby* v. *Gresham Life*, 29 Beav. 439, 31 L. J. Ch. 94, 4 L. T. N. S. 347, 9 W. R. 547, 7 Jur. N. S. 383

(*m*) *Newton* v. *Gore District Mutual Fire Insurance Co.*, 33 U. C. (Q. B.) 92.

(*n*) *Riach* v. *Niagara Co.*, 21 U. C. (C. P.) 464.

(*o*) *Levy* v. *Baillie*, 7 Bing. 369.

(*p*) See also *Britton* v. *Royal Insurance Co.*, 4 F. & F. 905 and notes, 15 L. T. N. S. 72.

(*q*) *M'Leod* v. *Citizens' Insurance Co.*, 3 Russ & Ch. (Novia Scotia) 156.

(*r*) *Cann* v. *Imperial Fire Insurance Co.*, 1 Russ. & Ch. (Novia Scotia) 240.

(*s*) *Rice* v. *Provincial Insurance Co.*, 7 U. C (C. P.) 548. *Moore* v. *Protection Insurance Co.*, 29 Maine 97

(*t*) *Canada Landed Credit Co.* v. *Canada Agricultural Insurance Co.*, 17 Grant (U. C.) 418. *Laidlaw* v. *Liverpool and London Co.*, 13 Grant (U. C.) 377.

insured do his best to save his goods notwithstanding that he is insured (*u*).

What the condition includes.—But the condition covers—(i.) Fraud after the right of action has accrued, such as (a) any attempt to cheat the insurer in respect of the amount of claim or otherwise (*x*); (b) any statements or allegations which are intentionally false and relevant to the account of loss whether intended or not to cheat the insurer.

Condition as to fraud in claim and arson.—(ii.) Arson of the insured or any claimant under the policy, including any person who would in any event be entitled to the value of houses or goods such as a mortgagee or bill of sale holder or other person to whose order the policy-moneys were made payable. The crimes in question are all included under the general head of arson (*y*).

False statement in claim.—False in the condition means wilfully and intentionally false (*z*). If the plaintiff prefers a claim which he knows to be false and unjust he can recover nothing.

The false statement must have reference to the claim and not to any immaterial or collateral object (*a*), since the condition is to be construed with reference to its interest and object, viz., the account of the loss and value of the property insured (*b*), ([16]).

As to fraud in the claim.—Fraud in the claim is quite distinct from fraud in *the proposals and negotiations for the [* 200] policy (*c*). While excessive valuation may be material before the taking of a risk (*d*), and make the policy void *ab initio*, excess in the claim only operates by destroying the remedy and putting the claimant out of court (*e*).

Excessive claim not conclusive of fraud.—The mere fact of excess is not conclusive of fraud (*f*). Valuation is to a large degree matter of opinion, but over-valuation may be so great as to be incompati-

(*u*) See cases under removal, p 121 *et seq.*

(*x*) *Greiner* v. *Monarch Co.*, Lr. Can. Jur. 100. *Seghetti* v. *Queen Insurance Co.*, 10 Lr. Can. Jur. 248. *Harris* v. *Lancashire Co.*, 10 Lr. Can Jur. 268

(*y*) This is dealt with more fully in the chapter on "Risk."

(*z*) *Britton* v. *Royal Insurance*, 4 F. & F. 905, 15 L T. N. S. 72. *Levy* v. *Baillie*, 7 Bing. 249. *Steeves* v. *Sovereign Fire*, 4 Pug. & Burb. (New Bruns.) 394. *Reg* v. *Boynes*, 1 C. & K. 65. *Mason* v. *Agricultural Mutual Fire Insurance Co.*, 18 U. C. (C. P.) 19, and see *Chapman* v. *Pole*, 22 L. T. N. S. 306.

(*a*) *Crowley* v. *Agricultural Mutual Fire Insurance Co.*, 21 U. C. (C. P.) 567.

(*b*) Ross v. *Commercial Union Assurance Co.*, 26 U. C. (Q. B.) 552.

(*c*) See *Britton* v. *Royal Insurance Co.*, 4 F. & F 905 notes, 15 L. T. N. S. 72.

(*d*) *Ionides* v. *Pender*, L R 9 Q. B., 531, 43 L. J. Q. B. 227, 30 L. T. N. S. 547, 21 W R 884.

(*e*) *Meagher* v. *London and Lancashire*, 7 Victoria L. R. 390.

(*f*) *Ibid.* *Levy* v. *Baillie*, 7 Bing 349.

[16] The company, when sued for loss, must show fraud or intended false swearing as to a material matter. *Oshkosh Packing and Provision Co.* v. *Mercantile Ins. Co.*, 31 Fed. Rep. 200.

ble with good faith, or may be dishonestly made (*g*). Consequently the proper direction for the jury in such a case, it seems, would be to find for the plaintiff, unless on the evidence they thought the claim and declaration were fraudulently untrue. In *Levy* v. *Baillie* (*h*) a new trial was ordered instead of entry of judgment for the defendants, which was asked for. This supports the view that the jury must expressly find fraud, and that it cannot be inferred from the discrepancy between the amount claimed and their verdict (*i*).

But jurors are apt to be exceedingly charitable in their construction of a plaintiff's motives whenever the defendants are an insurance company (*k*). Said a learned judge in Canada, "He may be sanguine enough to expect that another jury may be found to deal with his case in as large a spirit of charity as to his estimate of loss and the good faith of his affidavits as the jury which has [*201] *recently upheld his honesty of purpose in swearing that his actual loss was twelve times larger than they themselves found it to be" (*l*).

Mere misstatement will not invalidate claim.—Mere mistakes in the statement, &c., will not forfeit the claim (*m*). To ask that they should do so would be a breach of good faith on the part of the insurers. Mere overclaim will not prove nor even raise a presumption of fraud. Error or some degree of exaggeration or over-estimate does not amount to fraud, and in such cases the insured will be entitled to recover according to the real value and amount of loss actually sustained (*n*). But false swearing intended to deceive, not insurers, but other persons, may invalidate a claim (*o*).

Reckless statement.—If a claimant recklessly values his property, not knowing nor taking the trouble to ascertain the accuracy of his valuation, he can hardly complain if his claim be treated as fraudulent (*p*) within the principle laid down in *Reese River Co.* v. *Smith*, L. R. 4 H. L. 79, 39 L. J. Ch. 855, especially as reckless under-statement is more than unlikely.

Defence of arson.—Arson is discouraged as a defence to an action on a policy, since criminal matters are thereby mixed up with

(*g*) *Chapman* v. *Pole*, 22 L. T N. S 306. *Riach* v. *Niagara District Mutual Fire Insurance Co.*, 21 U. C (C. P.) 464. *Jersey City Co* v. *Nichols*, 35 New Jersey Eq. 291.

(*h*) 7 Bing 349; see *M'Millan* v. *Gore District Mutual Fire Insurance Co.*, 21 U. C. (C P.) 123, and *Gould* v *British America Assurance Co.*, 27 U C. (Q. B.) 473, reviewing all cases.

(*i*) See findings in *Harris* v. *London and Lancashire*, 10 Lr. Can Jur. 268, 274.

(*k*) *Riach* v. *Niagara District Mutual Fire Insurance Co.*, 21 U. C. (C. P.) 464, 472.

(*l*) *M'Millan* v. *Gore District Co*, 21 U. C. (C. P.) 123.

(*m*) *Jones* v. *Mechanics' Fire Insurance Co.*, 13 Am. Rep. 405. See *Meagher* v. *London and Lancashire Fire*, 7 Victoria L. R. 390, 395. *Mason* v. *Harvey*, 8 Ex. 819, 22 L. J. Ex 336, 21 L. T. 158.

(*n*) *Chapman* v. *Pole*, 22 L. T. N. S. 306.

(*o*) *Claflin* v. *Commonwealth Insurance Co.*, 110 U. S. (3 Davis) 81.

(*p*) See *Meagher* v. *London and Lancashire Fire*, 7 Victoria L. R. 390, 394.

civil proceedings (*q*), and the crime must, if imputed, be so fully proved as to justify the jury in finding the plaintiff guilty on indictment (*r*). And the Court will be very unwilling to grant a new trial where such a defence has been raised (*s*).

Proof of his loss is, of course, upon the assured. He [202] must show, if required, that the goods were on the premises at the date of the fire, and were lost, damaged, or stolen (*t*).

Condition that company may enter premises.—A further conditions in fire policies is as follows:—"On the happening of any loss or damage by fire to any property in respect of which a claim is or may be made under this policy, the company, without being deemed a wrongdoer, may, by its authorized officer and servants, enter into the buildings or place in which such loss or damage has happened, and for a reasonable time remain in possession thereof, and of any property hereby insured which is contained therein, for all reasonable purposes relating thereto or in connection with the insurance hereby effected thereon, and this policy shall be evidence of leave and license for that purpose."

Insurers not to remain on premises unreasonable time.—This condition is inserted in order to enable the insurers to see for themselves the nature of the damage and the causes thereof, and of testing the accuracy of the proposals and *bona fides* of the insured. They are thereby given leave and license to enter before any claim is made on getting notice of the fire. They will be liable to an action for damages if they retain possession unreasonably long (*u*), and they are not entitled to prevent the assured seeing the salvage.

Purpose of condition as to entry.—What the insurers want the license to enter for is to enable them to ascertain—

1. The exact description of the building insured, to see if it tallies substantially with the description thereof given at the obtaining of the policy and of the risk.

2. The nature of the trade carried on at the time of the fire, to see whether it is in accordance with the conditions.

3. The cause of, and place where, the fire began, with a [203 view to detecting any attempt at arson.

4. The amount of damage done thereby, and that they may be able to protect the salvage.

The insured is bound to give all his knowledge on these subjects.

Condition as to reinstatement.—Fire policies also invariably contain a condition as to reinstatement, which usually is to the following

(*q*) *Britton* v. *Royal*, 4 F. & F. 905, 908, 15 L. T. N. S. 72. *Goulstone* v. *Royal*, 1 F. & F. 276.

(*r*) *Thurtell* v. *Beaumont*, 1 Bing. 339, 8 Moore C. P. 612, 2 L. J. C. P. 4. The American Courts hold less strict proof necessary.

(*s*) *Gould* v. *British America Assurance Co.*, 27 U. C. (Q. B.) 473. But see *M'Millan* v. *Gore District*, 21 U. C. (C. P.) 128.

(*t*) *Harris* v. *London and Lancashire Fire*, 10 Lr. Can. Jur. 268.

(*u*) *Oldfield* v. *Price*, 2 F. & F. 80. *Norton* v. *Royal Co.*, *Times*, 8 May and 18 Aug. 1885.

effect:—The company may, if it think fit, reinstate or replace property (*x*) damaged or destroyed instead of paying the amount of the loss or damage, and may join with any other company or insurers in so doing in cases where the property is also insured elsewhere (26a).

This condition as regards policies on English realty or chattels affixed to the freehold is in the main only declaratory to the law as enacted by s. 83 of 14 Geo. III. c. 78. That Act does not apply to Scotland (*y*) or Ireland (*z*), nor to personalty in England (*a*). *Condition gives larger powers than statute.*—As to these countries and property of that kind, the condition enlarges the powers of the insurers, and the time for reinstatement is also usually enlarged (*b*) by the terms of the condition.

Moreover, the condition enables the insurers to reinstate without reason given and where there is no suspicion (*c*), so that they can reinstate in cases of dispute as to the amount of damage, or where they think reinstatement will be cheapest for them. They are under statutory obligations to reinstate in suspicious cases.

[* 204] **Damage may be repaired.*—The right to reinstate under the condition arises whether the destruction is total or partial (*d*).

Whether company must abide by election to reinstate.—If the company elect to reinstate, they must do so, and cannot fall back on payment (*e*), unless by failure of the assured's title to the *locus in quo* the insurers cannot lawfully enter to reinstate (*f*). The converse is equally true. The power to combine with other insurers in reinstating is important in cases where there are several interests in the property insured, as in case of mortgages (*g*).

Condition as to forfeiture of premiums.—The last condition in a fire policy is to the following effect:—In all cases where the policy is void or has ceased to be in force under any of the foregoing conditions, all moneys paid to the insurers in respect thereof will be forfeited. Being a condition as to forfeiture, it may be waived. And it does not seem to apply to cases where the policy does not attach at all.

Waiver of the forfeiture.—It may be asserted broadly that if, in

(*x*) Reinstatement is "Replacement in forma specifica," *Sutherland* v. *Sun Fire*, 14 C. S. C. (2nd series) 775.

(*y*) *Bissett* v. *Royal Exchange*, 1 C. S. C. (1st series) 174.

(*z*) Being prior to the Union.

(*a*) Ex parte *Goreley*, 4 De G. J. & S. 477, 34 L. J. Bkcy. 1, 11 L. T. N. S. 319, 10 Jur. N. S. 1085, 13 W. R. 60.

(*b*) *Sutherland* v. *Sun Fire*, *supra*.

(*c*) *Bissett* v. *Royal Exchange*, 1 C. S. C. (1st series) 174.

(*d*) *Sutherland* v. *Sun Fire*, 14 C. S. C. (2nd series) 775.

(*e*) *Ibid.*, 779. *Brown* v. *Royal*, 1 E. & E 853, 28 L. J. Q. B. 275, 33 L. T. 134, 7 W. R. 479, 5 Jur. N. S. 1255.

(*f*) *Anderson* v. *Commercial Union*, 55 L. J. Q. B. 146, 34, W. R. 189.

(*g*) *Scottish Amicable Association* v. *Northern Assurance Co.*, 21 Sc. L. R. 189, 11 C. S. C. (4th series) 287.

(26a) See chap. 12 on Reinstatement.

any negotiations or transactions with the insured after knowledge of the forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon, or requires the assured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is waived (*h*).

Conditions of life insurance different from those of other insurance.—The conditions of life insurance differ widely from those in other insurance. There can be no conditions as to proof of damage in a life policy, the contract apart from questions of bonus being to pay a liquidated sum on a given event. Proof of age ([27]) and death ([28]) is all that is needed, and often the former is admitted at the outset.

**Kinds of conditions.*—The other conditions of life insur- [* 205] ance may be classified as follows:—

(a) Limiting the region wherein the insurance operates.

(b) Limiting the occupations in the exercise of which the assured is protected.

(c) Specifying certain modes of death, on the happening of which the sum insured will not be payable, *e. g.*. suicide, hands of justice, or duel, or act violating the law.

(d) Requiring timely payment of premiums, but providing a means of reviving lapsed policies where the risk has not been materially changed in the interval.

(e) Making the undertaking of the risk conditional on the truth of all statements or answers made on the application to insure, whether the insurance be on own or another's life, and whether the statements be made by the assured or his agents.

Conditions may make contract void or voidable. Waiver of breach.—It will be seen that under the last class of conditions only can the policy be void *ab initio*. a, b, c, are conditions which amount to exceptions from the risk taken. It seems, however, that in the case as well of a condition making the policy void as of one making it voidable, the non-fulfilment of the condition may be waived by the insurers, if they do any act amounting to an affirmance of the contract after knowledge of the breach of the condition (*i*).

Leave and license by the insurer to break the condition, will also save the rights of the insured (*j*).

(*h*) *Titus* v. *Glen Falls Co*, 81 N. Y. 410, 419. See *Robertson* v. *Metropolitan Life Insurance Co.*, 88 N. Y. 541, and *Insurance Co.* v. *Norton*, 6 Otto (96 U. S.) 234, which goes into English cases. *Ward* v. *Day*, 4 Best & Sm. 337.

(*i*) *Armstrong* v *Turquand*, 9 Ir. C. L. R. 32. *Wing* v. *Harvey*, 5 De G. M. & G. 265, 23 L. J. Ch. 511, 18 Jur. 394, 23 L. T. 120, 2 W. R. 370. *Supple* v. *Cann*, 9 Ir. C. L. R. 1.

(*j*) *Reis* v. *Scottish Equitable*, 2 H. & N. 19, 26 L. J. Ex. 279, 29 L. T. 113, 5 W. R. 592, 8 Jur N. S. 417.

[27] False representation as to age rendered a contract invalid. *Sweet* v. *Citizens' Mutual Relief Society*, 78 Me. 541.

[28] Denial of liability is a waiver of right to require proof of death. *Kansas Protective Union* v. *Whitt*, 36 Kan. 760.

[* 206] *Non-disclosure of medical attendant. Of disease.*—If the assured fails to disclose the names of medical men employed by him, and answers as if he had none, and omits to state that he was afflicted with disease, having reasonable grounds for believing that he was so afflicted, his policy will be void.

Age. Proof of age.—So also if he misstates his age. And if it is not admitted in the policy, parol proof thereof cannot be given until the non-existence of baptismal or birth register has been proven (*k*).

As to omissions. Misrepresentations.—The condition as to misrepresentation or omission to communicate material facts refers only to the time of negotiating for and effecting the policy, and not to any subsequent time (*l*). This is more especially applicable to life policies, the premiums being settled with reference to the assured's health and prospect of life at the time when the policy is granted.

Geographical limits.—If a life policy contain a stipulation that the assured is not to go beyond certain limits, if the insured goes even for an instant outside those limits, though without the least injury to his health, the condition attaches and the policy becomes void (*m*), and is not merely suspended while the assured is without the limits unless some provision to that effect is contained in the policy.

Even where such a condition is inserted in a policy, provisions are usual allowing the assured at a price to obtain a license to go outside the specified limits. And there is a general tendency on the part of insurers to remove local restrictions and grant "whole-world" policies so as to avoid the obvious inconveniences of the older system.

Payment of premium prevented by war.—Where a man was prevented from performing the condition to pay the annual premium by a state of war, a majority of the Supreme Court of the [* 207] United States *held that the policy must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of war; but that, such failure being caused without the fault of the insured, he was entitled to recover from the insurers the surrender value of the policy with interest from the close of the war (*n*). *Return from abroad after expiry of licence prevented by illness.*—And it has been held also in America that a man licensed for a time to go outside the territorial limit prescribed in his policy will not lose the benefit thereof if hindered from returning by illness ultimately fatal, but only resulting in his death after expiry of the licence (*o*). *Delay to act on licence.*—And in

(*k*) *Hartigan* v. *International Life*, 8 Lr. Can. Jur. 208.

(*l*) *Pim* v. *Reid*, 6 M. & G. 1, 12 L. J. C. P. 299, 6 Scott N. R. 982.

(*m*) *Beacon Life and Fire Co.* v. *Gibb*, 1 Moore P. C. N. S. 78, 100, 7 L. T. N. S. 74, 9 Jur. N. S. 185, 11 W. R. 194.

(*n*) *New York Life* v. *Statham*, 3 Otto (93 U. S.) 24.

(*o*) *Baldwin* v. *New York Life*, 16 N. Y. Sup. Ct. (3 Bosworth) 580.

England it has been held, that where a licence was given to the insured to reside abroad for one year, and he delayed to go abroad for three years, and then left this country, and died within a year, he was held to have acted within the licence (*p*).

Policy sur autre vie in Scotland not avoided by suicide.—In Scotland, policies by persons on lives other than their own are not avoided by suicide of the life insured (*q*), and in this country it seems to be usual in policies on the lives of others to omit the condition against suicide.

Military or naval service.—No cases seem to have arisen in England under the condition as to military service, since English policies usually stipulate only that active service shall be a ground of enchancement of premium. The extra premium is usually paid and no questions arise. In America in absence of such a stipulation it has been decided that a clerk in the adjutant-general's department not subject to military law is not in military service (*r*), and that a man will be none the less in such service if he is taken as a conscript or goes merely to avoid compulsion (*s*).

**Person effecting policy on another's life bound by his misrepresentation.*—He who takes out a policy on the life of another person in which he has interest will be bound by wilful misrepresentation or suppression of the truth by such person to induce the insurers to grant the policy, and more especially if such representations are incorporated in the policy. For thereby the bargain is only conditional, and it is equally a condition in the policy, be it made by whomsoever it may (*t*). Independently of the condition, the person on whose life the policy is to be made, if referred to for information, is made thereby agent of the assured, and the latter will be bound by his statements (*u*). It makes no difference that the assured had simply told the insurer's agent to make inquiries of the person on whom the policy was to be made. [* 208]

But if the assured has made most of the representations, and only refers to the life on certain specific points, the knowledge of the life outside that particular matter is not knowledge of the assured (*x*).

Concealment of refusal by former company to accept insurance.—An applicant for insurance who conceals from the agent to whom he applies that he has already applied to and been refused by an agent of the same company, conceals a material fact. Knowledge of the applicants previous dealings with other insurers is at least as ma-

(*p*) *Notham* v. *Anchor Co.*, 4 C. B. N. S. 476, 27 L. J. C. P. 275, 4 Jur. N. S. 712, 6 W. R. 688, 31 L. T. 202.

(*q*) Bell's Principles 241.

(*r*) *New York Life* v. *Hendren*, 24 Gratt. (Vt.) 540.

(*s*) *Dillard* v. *Manhattan Life*, 9 Am. Rep. 167.

(*t*) *Maynard* v. *Rhode*, 1 C. & P. 360, 363, per Bayley, J., 5 Dowl. & R. 266.

(*u*) *Everett* v. *Desborough*, 5 Bing. 503.

(*x*) *Huchman* v. *Fernie*, 3 M. & W. 505, 7 L. J. N. S. Ex. 163, 2 Jur. 144.

terial in fire as in life. Indeed, the only thing most fire insurers want to know is the character of the insured, and the questions asked by them are mainly directed to his dealing with other insurance offices (*y*).

(*y*) *Goodwin* v. *Lancashire Fire*, 16 Lr. Can. Jur. 298, 18 do. 1. *London Assurance* v. *Mansell*, 11 Ch. D. 363, 48 L. J. Ch. 331, 27 W. R. 444. *Daintree's claim*, 18 W. R. 396.

CHAPTER IX. [209

ARBITRATION.

Earlier view of agreements to refer. Jurisdiction of Courts not to be ousted.—An unqualified agreement to refer to arbitration and precluding the contracting parties from suing in the Queen's Courts is invalid, for the Courts will not allow their jurisdiction thus to be ousted. And where a policy of insurance contained a clause that in case of loss or dispute it should be referred to arbitration, it was held that, if there had been a reference depending or made and determined, it might have been a bar, but the agreement of the parties could not oust the Court; and as no reference had been nor was any depending, the action was well brought, and the plaintiff must have judgment (*a*).

In *Horton* v. *Sayer*, Pollock, C. B., said: "In this case the deed discloses nothing more than an agreement generally to refer all disputes to arbitration, and that does not prevent the plaintiff from maintaining this action" (*b*).

Rule as to ouster.—Regarding the rule that the jurisdiction of the Court should not be ousted, Coleridge, J., said: "I certainly am not disposed to extend the operation of a rule which appears to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals" (*c*).

**Scott* v. *Avery. Old rule qualified.*—And in *Scott* v. *Avery* it was [* 210] decided that where parties have entered into a contract for indemnity, they may, if they choose, agree that in the event of any loss occurring such loss shall be ascertained by an arbitrator they may select, and they may agree to pay such loss when it has been ascertained, and not otherwise (*d*). This case has been the subject of much comment and many explanations. *Statement of law, per Brett, M. R.*—In *Edwards* v. *Aberayron Company*, Brett, M. R., said (*e*): "The true limitation of *Scott* v. *Avery* seems to me to be that if parties to a contract agree to a stipulation in it, which imposes as a condition precedent to the maintenance of a suit or an action for breach of it the settling by arbitration of the amount of damage or the time of paying it, or any matters of that kind, which do not go to the root of the action, *i. e.*, which do not prevent any action at all

(*a*) *Kill* v. *Holister*, 1 Wils. 129. *Thompson* v. *Charnock*, 8 T. R. 139.
(*b*) *Horton* v. *Sayer*, 4 H. & N. 643, 29 L. J. Ex. 28.
(*c*) *Scott* v. *Avery*, 5 H. L. C. 811, 843, 25 L. J. Ex. 308, 2 Jur. N. S. 815, 4 W. R. 746.
(*d*) *Scott* v. *Avery*, 5 H. L. C. 811, 25 L. J. Ex. 308, 2 Jur. N. S. 815, 4 W. R. 746. *Brown* v. *Overbury*, 11 Ex. 715.
(*e*) 1 Q. B. D. 563, 596, 34 L. T. N. S. 457.

from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration; but a stipulation in a contract which in terms would submit every dispute arising on the contract to arbitration, and so preclude the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration, and for damages probably nominal. And this rule is founded on public policy. It in no way prevents parties from referring to arbitration disputes which have arisen; but it does prevent them from establishing, as it were, before they dispute, a private tribunal which may from ignorance do what the invented tribunal here did, namely, act and persist in acting in contravention of the most elementary principles of the administration of justice."[1]

[*211] *Statement of law, per Bramwell, B.*—The effect of *Scott* v. *Avery* is also well stated in *Elliot* v. *Royal Exchange* (*f*), by Bramwell, B.: "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so ascertained the sum, for to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common-sense, and is what I understand the House of Lords to have decided in *Scott* v. *Avery*" (*g*).

Statement of law, per Jessel, M. R.—There are only two cases where agreement to refer can be successfully pleaded—first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action (*h*). In all other cases, where

(*f*) L. R. 2 Ex. 237, 245, 36 L. J. Ex. 129, 16 L. T. N. S. 399, 15 W. R. 907, and see *Dawson* v. *Fitzgerald*, *infra*.

(*g*) See *Tredwen* v. *Holman*, 1 H. & C. 72, 79, 7 L. T. N. S 127, 10 W. R. 652, 31 L. J. Ex. 398, 8 Jur. N. S. 1080. *Wright* v. *Ward*, 20 W. R. 21, 24 L. T. N. S. 439. *Harvey* v. *Beckwith*, 2 H. & M. 429, 10 L. T. N. S. 632. *Babbage* v. *Coulburn*, 9 Q. B. D. 235, 52 L. J. Q. B. 50. *Willesford* v. *Watson*, 8 Ch. App. 473, 42 L. J. Ch. 447, 28 L T. N. S. 428, 21 W. R. 350.

(*h*) Per Jessel M. R., in *Dawson* v. *Fitzgerald*, 1 Ex. D. 257 at 260, 45 L. J. Ex. 894, 24 W. R. 778. *Edwards* v. *Aberayron Mutual Ship. Co.*, 1 Q. B. D. 563, 34 L. T. N. S. 457. *Roper* v. *Lendon*, 28 L. J. Q. B. 250, 1 E. & E. 825, 7 W. R. 441, 5 Jur. N. S. 491. *Scott* v. *Liverpool Corporation*, 28 L. J. Ch. 230, 3 De G. & J. 334, 32 L T. 265, 7 W. R. 153, 5 Jur. N. S. 105. *Wright* v. *Ward*, 24 L. T. N. S. 439, 20 W. R. 21.

[1] Refusal of insurer to pay any sum whatever precludes him from relying, when sued, on clause providing for arbitration before suit. *Western H. & C. Ins. Co.* v. *Putnam*, 20 Neb. 381.

there is first a covenant to pay, and secondly a covenant to refer, the covenants are distinct and collateral (*i*), and the plaintiff may sue on the first, leaving the defendant *to pursue [* 212] one of two courses—either to bring an action for not referring, or to apply, under s. 11 of the Common Law Procedure Act, 1854, to stay the action until there has been an arbitration, in which case a judge has power to prevent the case going to a jury if the arbitration can be fairly enforced (*k*).

Common Law Procedure Act, 1854, s. 11.—By the Common Law Procedure Act, 1854, s. 11, it is enacted that whenever the parties to any writing shall agree that any difference between them shall be referred to arbitration, and shall nevertheless commence any action in respect of the matters so agreed to be referred, it shall be lawful for the Court before which the action is brought, upon being satisfied that no sufficient reasons exists why such matters should not to be referred to arbitration, and that the defendant was at the time of the bringing of such action and still is ready and willing to concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action upon such terms as to such Court or judge may seem fit, provided that any such rule or order may at any time afterwards be discharged or varied as justice may require (*l*).

It is not a condition precedent to the right of the Court to refer to arbitration that all the parties must before action have been willing to go to arbitration (*m*).

Award not a condition precedent to action.—A clause stipulating that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibiting any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement; *and [* 213] an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award (*n*).

Ascertainment of amount condition precedent to action.—In *Braunstein* v. *Accidental Death Company* (*o*) the covenant was to pay such sum as should appear just and reasonable, and in proportion to the injury received, such sum to be ascertained in case of differ-

(*i*) *Collins* v. *Locke*, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. N. S. 292, 28 W. R. 189.

(*k*) Per Jessel, M. R., *Dawson* v. *Fitzgerald*, 1 Ex. D. 260, 45 L. J. Ex. 894, 24 W. R. 773. See also per Page Wood, V. C., in *Cooke* v. *Cooke*, 4 Eq. 77, 36 L. J. Ch. 480, 16 L. T. N. S. 313, 15 W. R. 981.

(*l*) 17 & 18 Vict. c. 125, s. 11.

(*m*) *Willesford* v. *Watson*, 8 Ch. App. 473, 42 L. J. Ch. 447, 28 L. T. N. S. 428, 21 W. R. 350.

(*n*) *Collins* v. *Locke*, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. N. S. 292, 28 W. R. 189.

(*o*) 1 B. & S. 782, 31 L. J. Q. B 17 (1861), 5 L. T. N. S. 550, 8 Jur. N. S. 506.

ence in manner provided by the stipulations and conditions indorsed on the policy. The Court held performance of the stipulation to be a condition precedent to the right to sue.

View that where insurers dispute any liability, action lies—A policy of insurance against fire stated that, if any difference should arise over any claim, it should be immediately submitted to arbitration, and such arbitration should be made by one or two persons to be indifferently chosen by the assured or his legal representative, and by the office or by such third person as the other arbitrators should appoint, and no compensation should be payable until after an award determining the amount thereof should be duly made. In an action on the policy, it was held that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover anything, and did not merely question the amount of damage (*p*), but see *Scott* v. *Avery*.

Where an adjustment by arbitration was made a condition precedent, and the insurers alleged that the policy was void by reason of concealment, it was held in Victoria that the assured [* 214] could not sue till after *such adjustment (*q*). This does not seem consistent with the last case; and in a case in Lower Canada where a reference was made to valuers without waiver of the conditions of the policy, it was held that the insurer had not lost his right to use the conditions of the policy as to forfeiture if such were proved (*r*).

Construction of condition to refer.—*Gorman* v. *Hand-in-Hand* (*s*) was the case of a policy containing a covenant (subject to the conditions indorsed on the policy) to pay or make good all loss or damage not exceeding the amount insured, and a condition to refer differences, "which condition is to be deemed and taken to be an agreement to refer." The Court held that this meant that the remedy for the breach of that condition was action or application under the Irish Common Law Procedure Act, 1856, s. 16, which remedy was wholly inapplicable to any provision qualifying the covenant to pay, and postponing the cause of action thereon until ascertainment by arbitration, since application under the statutes presupposes an existing cause of action, while the essence of the provision qualifying the covenant is that the cause of action is not complete.

A policy of insurance against accident contained (*t*) a condition that all disputes should, if the assured or his legal personal representative or the company required it, be referred to arbitration in the manner specified in the company's private Act (*u*), which em-

(*p*) *Goldstone* v. *Osborne*, 2 C. & P. 550.
(*q*) *London and Lancashire* v. *Honey*, 2 Victoria L. R. 7.
(*r*) *La Rocque* v. *Royal*, 23 Lr. Can. Jur. 217.
(*s*) I. R. 11 C. L. 224.
(*t*) *Minifie* v. *Railway Passengers' &c.*, 44 L. T. N. S. 552.
(*u*) 27 & 28 Vict. c. cxxv. s. 33.

powered the Court or a judge to stay proceedings contrary to the Act (*x*). *Action stayed, fraud not charged.*—The Court ordered a stay of proceedings in an action, as no issue of fraud was raised, and no reason appeared why the matter in *question [*215] could not or ought not to be referred to arbitration.

Right to sue where fraud in question.—Some discussion has arisen on the question whether if fraud were charged this would entitle the plaintiff to a jury. Pollock, B., in *Minifie* v. *Railway Passengers', &c.*, says, "Where fraud is imputed to the claimant, whether he be the assured or his personal representative, it would be difficult to say that the plaintiff ought not to have the opportunity of clearing himself from so grave a personal imputation in open court" (*y*).

And this view has been taken in *Wallis* v. *Hirsch* (*z*), approved in *Hirsch* v. *Im Thurn* (*a*). Jessel, M. R., in *Russell* v. *Russell* (*b*), expressed himself by no means satisfied that the mere desire of the person charging the fraud was a sufficient reason for the Court refusing to send the case to arbitration, although if the person charging the fraud did not desire a reference the Court ought to investigate the circumstances, and might, on a *primâ facie* case of fraud being shown, in the exercise of its discretion refuse the order. Where, however, the person charged with the fraud desires an investigation before a public tribunal, the Court ought, said his lordship, as a rule, to exercise its discretion, and to refuse to refer the matter in dispute to arbitration.

Seaworthiness not to be referred.—On this principle it would seem that Lord D nman held, in *Harrison* v. *Douglas*, 3 A. & E. 396, that an issue as to the seaworthiness of a vessel was for a jury and not matter of reference within an arbitration clause.

*And in Scotland it has been held that after a claim has [*216] been submitted to arbitration and awarded on in favour of the insured, the insurers could still raise the question of fraud (*c*).

Issue amounting to fraud.—An agreement making settlement of the loss in a certain way a condition precedent to the bringing of an action does not compel the party to submit to arbitration the question whether or not the policy is void by reason of misrepresentation as to the condition of the property insured (*d*).

Point of law not to be referred.—Bacon, V. C., has decided that the assured is not bound to submit a legal point to arbitration before suing (*e*).

(*x*) Identical with s. 11 of the Common Law Procedure Act, 1854.

(*y*) *Minifie* v. *Railway Passengers' Assurance Co.*, 44 L. T. N. S. at 554.

(*z*) 1 C. B. N. S. 816.

(*a*) 4 C. B N. S. 569. See also *Willesford* v. *Watson*, 8 Ch. App. 473, 42 L. J. Ch. 447, 28 L. T. N. S. 428, 21 W. R. 350.

(*b*) 14 Ch. D. 471 (1880), at p. 477, 49 L. J. Ch. 268.

(*c*) *Hercules Ins. Co.* v. *Hunter*, 15 C. S. C. (1st series) 800.

(*d*) *Alexander* v. *Campbell*, 41 L. J. Ch. 478, 27 L. T. N. S. 25.

(*e*) *Ibid.*

The right to have the matter in dispute referred to arbitration may, like other provisions in favour of the assured, be waived (*f*).

Waiver of right to arbitration.—1. Payment of money into court in an action commenced on the policy has been held waiver of condition precedent as to deciding disputes by arbitration (*g*).

2. Taking possession of the insured property for purpose of repairs (*h*). In the case of a ship this would be acceptance of abandonment; in the case of a house it would amount to election to reinstate.

3. Where a provision is made for reference, the action, it seems, may be maintained if the insurers have not made any offer to refer or have simply refused to pay at all (*i*) [1]

[* 217] **No specific performance of agreement to refer.*—Specific performance cannot be had of an agreement to refer (*j*), nor can any measure of damage for breach of such an agreement be easily found, except by adopting the suggestion of Lord Eldon (*k*), that the agreement should contain the mention of a fixed sum as agreed and liquidated damages for any attempt by either party to disregard the arbitration clause, and agreements to refer may be indirectly enforced by a motion to stay proceedings until reference had under s. 11 of the Common Law Procedure Act, 1854 (*l*).

Insurance in friendly societies.—Where an insurance is made with a society, under the Friendly Societies Act, 1875 (*m*), disputes between a member or a person claiming through (*n*) a member (his heirs, executors, administrators, or nominees where nomination is allowed), or claiming under the rules of a registered friendly society, and the society or an officer thereof, must be decided in the manner directed by the rules of the society, and the decision so made is binding and conclusive on all parties without appeal, and cannot be removed into any Court of Law or restrained by injunction. Enforcement thereof may be had through the county court. The Act contains further provisions as follows:

1. Unless the rules of the particular society forbid it, the parties to a dispute in a society may by consent refer the matter in dispute to the Chief Registrar or the Assistant Registrar of Friendly Societies of Ireland or Scotland.

(*f*) *Fox* v. *Railway Passengers' Co.*, 54 L. J. Q. B. 505, 52 L. T. 672.
(*g*) *Harrison* v. *Douglas*, 3 A. & E. 396.
(*h*) *Cobb* v. *N. E. M. Marine*, 72 Mass. (6 Gray) 192.
(*i*) *Robinson* v. *George Insurance Co.*, 17 Maine 13. *Millaudon* v. *Atlantic*, 8 Louisiana O. S. 558. See *Fox* v. *Railway Passengers' Co*, *supra*.
(*j*) *Mexborough* v. *Bower*, 7 Beav. 127, per Lord Langdale.
(*k*) *Street* v. *Rigby*, 6 Ves 815.
(*l*) *Ante*, p 208, and see *Hodgson* v. *Railway Passengers' Co.*, 9 Q. B. D. 188.
(*m*) 38 & 39 Vict. c. 60, ss. 21, 22.
(*n*) Altered to meet the case of *Kelsall* v. *Tyler*, 25 L. J. Ex. 153. The old Act had "on account of."

[1] Refusal of insurer to pay any sum whatever precludes him from relying, when sued, on clause providing for arbitration before suit. *Western H. & C. Ins. Co.*, v. *Putnam*, 20 Neb. 331.

2. Where the rules provide for a reference to justices, a court of summary jurisdiction is to decide unless the *par- [* 218] ties choose to consent to go to the county court, in which case that Court is empowered to hear and determine the question in dispute.

3. Where the rules of a society contain no direction as to disputes, and no decision on a dispute is given within forty days after application by the society for a reference under its rules, the members or person aggrieved may apply either to the county court or a court of summary jurisdiction, which may hear and determine the matter in dispute.

4. *Disputes as to claims.*—The Court, chief or other registrar, may at the request of either party state a case for the opinion of the Supreme Court of Judicature on any question of law, and may also grant to either party such discovery as to documents and otherwise or such inspection of documents as might be granted by any Court of Law or Equity, such discovery to be made on behalf of the society by such officer of the same as such Court or registrar may determine.

It was for a time thought, owing to the punctuation of the statute, that by s. 30 the member of any friendly society whatsoever, or person claiming through him, might, notwithstanding the rules of the society, apply to the county court or to the court of summary jurisdiction for the place where such members and other persons resided, and that such Court might settle the dispute in manner therein provided (*o*).

Mode of declining claims. In *Holt's Case* (*p*) a claim was made by the representative of Thomas Holt for £14 as funeral allowance. The society resisted, and the claimant applied to the magistrate, though the rules of the society provided for *arbitra- [* 219] tion. The Queen's Bench Division held that he was entitled to do so under s. 30, sub-s. 10, notwithstanding the provisions of s. 22. But 42 & 43 Vict. c. 9, was immediately passed, declaring that s. 30 applied only to such friendly societies, registered or not, and industrial insurance companies as receive contributions by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the society or company. So *Holt's Case* has no longer any force. But s. 22 is so far controlled by s. 30 that members or persons claiming through them, where the society on which they claim receives its subscriptions through collectors and collects outside a radius of ten miles from its head office, may sue in their domestic forum or local court instead of arbitrating. In these cases the defendant is made to follow the plaintiff.

Arbitration under the Railway Passengers' Assurance Company's Act. —By the Railway Passengers' Assurance Company's Act, 1864 (27

(*o*) Re *Alfred Holt*, 4 Q. B. D. 29.
(*p*) 4 Q. B. D. 29.

& 28 Vict. c. cxxv.), the company, or assured, or the representatives of the assured, may require any question or difference arising on any contract of insurance entered into by the company to be referred to arbitration (ss. 3, 16), and if the assured, or his legal representatives, shall, in a case referable to arbitration under the Act, commence an action against the company, the Court or a judge, may, upon the application of the company, stay all proceedings in the action upon being satisfied that no sufficient reason exists why the matters cannot be, or ought not to be, referred to arbitration, and that the company were at the time of the bringing of the action, and still are, ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration (s. 33). Under this statute, if arbitration is required by the company before action, then upon an action being commenced the company might plead their demand of arbitration as an answer to the action, [* 220] or apply to the Court to stay proceedings. If, *however, arbitration is not required by the company before action brought, and after the commencement of the action they apply for a stay of proceedings therein, the Court can only grant it upon being satisfied as provided by s. 33, and the onus of so satisfying the Court rests upon the company (*q*).

(*q*) *Fox* v. *Railway Passengers' &c., Co.*, 54 L. J. Q. B. 505, 52 L. T. 672.

CHAPTER X. [221]

INDEMNITY.

All policies on property contracts of indemnity.—All policies on property are contracts of indemnity, and the law will not permit them to be otherwise construed (*a*). It is quite immaterial what may be the nature of the property or risk (*b*). *Valued policies.*—Even in the case of valued policies, which are rare, except in marine insurance, the interest of the assured must be proved (*c*). And the valuation only dispenses with proof of the amount of such interest. Valued fire policies are practically unknown in England (*d*).

Indemnity is against loss not against accident.—Insurance is a contract of indemnity, not against accident, but against loss caused by accident; therefore, if a policy is a time policy, the loss and not merely the accident, must accrue within the time covered by the policy (*e*). *Extent of indemnity.*—Whilst the contract is one of indemnity, it is a contract of indemnity only to the amount whereon premium has been paid. The indemnity is limited to the amount named in the policy, and can in no case exceed that. This is the rule as to specific policies, *i. e.*, those in which the things insured are constant and not variable from day to day, as in the case of merchandise. Such policies are those on houses and buildings. Where the policy is made subject to the conditions of average, and the goods at risk exceed in value he amount insured on goods in the place named, the risk only *attaches to goods [* 222] to the amount of such value. As to the rest, the assured must abate his claim for indemnity, in such a way that on the settlement of accounts between the parties he shall have borne a portion of the loss proportionate to the amount by which he was at the time of the loss under-insured.

Indirect damage not covered.—The contract to indemnify made by a policy only promises indemnity as to direct damages. No damage indirectly resulting from the happening of the event insured against can be recovered for. Thus damages for loss of business

(*a*) *London Assurance* v. *Sainsbury*, 3 Doug. 245 (1785). *Goss* v. *Withers*, 2 Burr. 683, 697 (1758).

(*b*) *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*c*) *Lewis* v. *Rucker*, 2 Burr. 1170.

(*d*) *Bissett* v. *Royal Exchange*, 1 C. S. C. (1st series) 174.

(*e*) Per Lord Esher, M. R., *Hough* v. *Head*, 55 L. J. Q. B. 43, 53 L. T. 809, 34 W. R. 160.

cannot be recovered under a policy on a tavern (*f*), nor for want of occupancy, or wages paid to servants thrown out of work by the destruction of the property (*g*), nor under an accident policy for anything but the expenses, &c., attendant thereon (*h*). Damage in the removal of furniture or by fall of a wall injured by the fire, or by water used in putting it out, has been held direct (*i*).

Indemnity—market value.—The amount of the indemnity is determined, not by the cost, but by the value at the date of the loss of that which is insured. By value is meant the intrinsic or market value on the day of the fire or other mishap insured against (*j*). But as regards houses full indemnity to a tenant or person having a limited occupying interest therein seems to include, not the mere market value of such interest, but the pecuniary value plus the value of the beneficial enjoyment (*k*). In such case indemnity is best attained by reinstatement. The assured, moreover, cannot under a policy on the house, recover any damages for loss of occupation, or the rent of a house which he is [* 223] obliged to take in *consequence of the fire. Those risks must be covered by a special insurance on rent (*l*).

A policy is not a contract of perfect indemnity (*m*), but a contract of indemnity against losses which arise out of a specified class of accidents. Particular losses may be selected, and the assured be guaranteed against them only (*n*). *Deduction. New for old.*—The indemnity offered is also limited in amount, and also by certain other qualifications; such as, for instance, the marine rule, one-third new for old, which was sprung up by the custom of trade, and operates in some cases to give more and in others to give less than complete indemnity (*o*).

This principle has in Ireland been applied to fire insurance; but it was said by Pennefather, B., that no settled rule of deduction, one-third or one-fourth, or of any other sum, existed in the case of old premises or property, but that the jury might, as a criterion of the actual damage, see what would be the expense of placing new machinery, such as was in the premises before the fire, and deduct

(*f*) *Waight* v. *Pole*, 1 A & E. 621.

(*g*) *Menzies* v. *North British*, 9 C. S. C. (2nd series) 694, following *Wright* v. *Pole*.

(*h*) *Theobald* v. *Railway Passengers' Assurance Co.*, 10 Ex. 45, 23 L. J. Ex. 249, 18 Jur. 583, 23 L. T. 222, 2 W. R. 528.

(*i*) *Johnstone* v. *West of Scotland Co.*, 7 C. S. C. (1st series) 53, 55 n.

(*j*) *Hercules Co.* v. *Hunter*, 14 C. S. C. (1st series) 1137, 15 C. S. 800.

(*k*) *Castellain* v. *Preston*, 11 Q. B. D. 400, per Bowen, L. J. See note (*b*) *supra*.

(*l*) *Buchanan* v. *Liverpool, London, and Globe*, 11 C. S. C. (4th series) 1032, 21 Sc. L. R. 696.

(*m*) *Irving* v. *Manning*, 1 H. L. C. 287, 307, 2 C. B. 784.

(*n*) Per Bowen, L. J., in *Hough* v. *Head*, 55 L. J. Q. B. 43, 53, L. T. 809, 34 W. R. 180.

(*o*) *Aitchison* v. *Lohre*, 4 App. Cas. 755, 762, 49 L. J. Q. B. 128, 41 L. T. N. S. 323, 29 W. R. 1.

therefrom the difference in value between the new and the old (*p*), since the cost of repairing is an element in the damage suffered by the assured in such a case. Goods and furniture, especially the former, can of course be replaced without other appreciable expense than their cost, but machinery and the like required fixing and setting in position, and sometimes such work is costly and like rebuilding.

Vance v. *Foster* (*p*) was a decision on circuit, and no case seems to have come before the full courts. It is clear that the custom to fix the ratio at one-third new *for old is not estab- [* 224] lished as to fire losses on land, but that similar computation is necessary to prevent over-compensation.

Doctrine of abandonment applicable to fire insurance.—The doctrine of abandonment intended to assist the principle of indemnity seems applicable not only to marine but to fire insurance, for Brett, L. J., said (*p*): "I concur in what has been said by Lord Blackburn (*q*), that abandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of indemnity. Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity."

Principle of abandonment.—Mr. Marshall thus states the principle upon which the right of abondoning rests (*r*): "The assured may abandon in every case where, by the happening of any of the misfortunes or perils insured against, the thing insured is so damaged and spoiled, or the charges for its salvage are so high, that the costs of repairing, restoring, or recovering it would exceed its marketable value after they had been assured, or where the assured is deprived of the free disposal of it under circumstances which render its restitution uncertain."

Why doctrine of abandonment rarely applied.—Probably one reason why the doctrine of abandonment is not more frequently applied in those cases where furniture or goods are insured is to be found in the nature of such articles. A body of the size and complex structure of a ship may be so injured as to be useless for its special practical purposes without becoming of no saleable value; and in such a case it *is obviously fair that such value [* 225] should be surrendered to the insurer when he pays as for a total loss. But such things as goods or furniture are, when considered singly, of a much simpler, smaller, and less costly character, and many of them are usually covered by one policy. Where, therefore, a part is injured or destroyed, the damaged articles are

(*p*) *Vance* v *Foster*, Ir. Circ. Rep. 47 (1841). *Hercules* v. *Hunter*, 14 C. S. C. (1st series) 1187, 15 do. 800.

(*p*) *Kaltenbach* v. *M'Kenzie*, 8 C. P. D. 467, 470, 38 L. T. N. S. 943, 26 W. R. 844

(*q*) *Rankin* v. *Potter*, L. R. 6 H. L. 83, 118, 42, L. J. C. P. 169, 29 L. T. N. S. 142, 22 W R. 1. See also *Mason* v. *Sainsbury*, 3 Doug. 63.

(*r*) Marshall on Insurance, 4th ed. 452.

usually paid for by the insurer. The value of the injured part being separate and distinct from, and not, as in the case of a ship, inseparably connected with the injured part, a full and fair deduction in respect of it can be made from the amount of the policy; and the assured is in no degree injured by having to retain the uninjured part of the subject-matter of the insurance.

Usually the damaged property is treated as salvage, and sold for what it will fetch, the sale price being accounted for between the parties.

Principle on which abandonment rests applies to insurance of chattels.—Whatever may be the difficulties arising in this branch of insurance law, it is clear that the principle upon which abandonment rests, viz., indemnity, does apply, as the insurer is entitled on payment to all ways and means of lessening the loss (*s*), though the rule as to notice of abandonment in claims for a constructive total loss is marine only.

Insurer reinstating, entitled to old material.—Where an insurer elects to reinstate, he is entitled to the old materials left by the fire, and in any case he will seek to reduce the amount of his indemnity by deducting their value.

Right of insurer in subject of insurance claim by after assured.—When the person idemnified [the assured] has a right to idemnity, and has elected to enforce his claim, the chance of any benefit from an improvement of the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the [* 226] *person indemnified to those who indemnify; and therefore, if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from further deterioration, such steps from the moment of election concern the party idemnifying, who ought, therefore, to be informed promptly of the election to come upon him, in order that he may, if he pleases, take steps for his own protection" (*t*).

In fire insurance this is effected by requiring immediate notice of a fire, and obtaining licence by a condition in the policy to enter the premises insured or wherein the things insured are.

Assured's election to claim for partial loss irrevocable.—On general principles of law (not confined to marine insurance) an election once determined is determined forever, and such a determination is made by any act that shows it to be made. And therefore anything which indicates that the person indemnified has determined to take to himself the chance of benefit from an increased value in the part saved, and only claim for the partial loss, will determine his election to do so (*u*).

(*s*) *Rankin* v. *Potter*, L. R. 6 H. L. 83 at 118, 42 L. J. C. P. 109, 29 L. T. N. S. 142, 22 W. R. 1. *Kaltenbach* v. *M'Kenzie*, 3 C. P. D. 467, 38 L. T. N. S. 943, 26 W. R. 844.

(*t*) Per Blackburn, J., *Rankin* v. *Potter*, L. R. 6 H. L. 83, 119.

(*u*) *Ibid.* And see *Clough* v. *London and North-Western Railway*, L. R. 7 Ex. 26, 34, 41 L. J. Ex. 17, 25 L. T. N. S. 708, 20 W. R. 189. *Mitchell* v. *Edie*, 1 T. R. 608, explained in *Roux* v. *Salvador*, 3 Bing N. C. 266.

Valued policy indemnity to amount of valuation.—A valued policy is a contract of indemnity to the owner, to the amount at which the property is valued in the policy. The assured, if he has received on other policies, can only ask for such a sum as, with that already received, will give him the amount which the insurers by the policy sued on have bargained to give him. The amount already received is to be treated as salvage received by the owner after constructive total loss. He and the insurer are both estopped from denying the value stated in the policy (*x*).

**Insurer can't require party primarily liable to be sued first.* [* 227] —The insurer, having contracted to indemnify, could not insist on others being sued first who were primarily liable (*y*), or on consolidation of his action with others by the same assured against other insurers in respect of the same loss (*z*). And it is no defence to an action by the assured against the party causing the damage, that the assured has been paid by his insurers (*a*).

Subrogation, what it is.—Subrogation, according to the older and narrower view, is the treating of an insurer, who has paid a loss, for which some other person is primarily liable, to the assured, as standing in the place of the assured so far as regards his rights of action against such persons. This view of the subject is well expressed in a recent American case by the following definition:—"Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the claim, its rights, remedies, or securities" (*b*). Subrogation, as constituting part of the law of indemnity, includes more than the mere transference to the insurer of existing rights of action against third parties vested in the assured in respect of the loss.

Per Lord Esher.—Probably the best and most inclusive as well as the most recent definition of subrogation has been given by the present Master of the Rolls, Lord Esher, in *Castellain* v. *Preston* (*c*), as follows:—"As between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted upon, or *already [* 228] insisted on, or in any other right, whether by way of condition or otherwise, which can be or has been exercised or has accrued; and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured

(*x*) *Bruce* v. *Jones*, 32 L. J. Ex. 132, 7 L. T. N. S. 748, 9 Jur. N. S. 628, 11 W. R. 871.

(*y*) *Dickenson* v. *Jardine*, 16 W. R. 1169, 18 L. T. N. S. 717, L. R. 3 C. P. 639.

(*z*) *M'Gregor* v. *Horsfall*, 3 M. & W. 320.

(*a*) *Propellor Monticello* v. *Mollison*, 17 Howard (U. S.) 152. *Yates* v. *White*, 4 Bing. N. C. 272.

(*b*) *Jackson* v. *Boylston Co.*, 139, Mass. 510.

(*c*) 11 Q. B. D. 881, 886, 52 L. J. Q. B. 866, 49 L. T. N. S. 29, 31 W. R. 557.

is insured can be or has been diminished. That seems to put this doctrine of subrogation in the largest possible form; and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated" (*d*).

As to anything not within the definition, the general law of indemnity must be looked at (*e*), and this definition is consonant with the view of Lord Blackburn (*f*), who states the principle somewhat more briefly and generally; and substantially the same view has been expressed by the Supreme Court of the United States (*g*).

The right of the insurer, however, to the advantage of every right of the assured must, it seems, be understood with this limitation, viz., that the right must be incident or attached to the ownership of the thing insured; *e. g.*, freight to be earned under a charter-party is not an incident to the ownership of the vessel, and therefore, although an underwriter of a policy of insurance upon a vessel becomes, by abandonment to him upon a constructive total loss happening through the fault of another vessel, entitled, after payment of the sum secured by the policy, to every benefit accruing from the ownership of the insured vessel, he cannot claim [* 229] any part of the damages recovered from the *owners of the wrongdoing vessel on account of loss of freight intended to be earned by the insured vessel (*g*).

Payment of loss by insurer no defence in action by assured against person causing loss. Subrogated insurer's right to damages recoverable by assured.—The mere payment of a loss by the insurer does not afford any defence to a person whose fault has been the cause of the loss in an action brought against the latter by the assured. But the insurer acquires by such payment a corresponding right in any damages recoverable by the assured against the wrongdoer or other party responsible for the loss (*h*). If the insurer has in fact paid, the tortfeasor cannot object that he paid without liability (*i*), nor can the wrongdoer limit the amount payable by him to that for which the assured has settled with the insurer (*j*). This right rests upon the ground that the insurer's contract is in the na-

(*d*) Same case, 886.

(*e*) Same case, 404, per Bowen, L. J.

(*f*) *Burnand* v. *Rodocanchi*, 7 App. Cas. 333, 339, 31 W. R. 65, 51 L. J. Q. B. 548, 47 L. T. N. S. 277.

(*g*) *Phœnix Co.* v. *Erie Co.*, 117 U. S. (10 Davis) 320.

(*g*) *The Sea Insurance Co.* v. *Hadden*, 13 Q. B. D. 706, 53 L. J. Q. B. 252, 50 L. T. 657, 32 W. R. 841.

(*h*) *Randall* v. *Cockran*, 1 Ves. Sen. 98. *Mason* v. *Sainsbury*, 3 Doug. 61. *London Assurance* v. *Sainsbury*, 3 Doug. 245. *Clark* v. *Blything*, 2 B. & C. 254. *Bradburn* v. *Great Western Railway*, Lr. 10 Ex. 1, 44 L. J. Ex. 9, 31 L. T. N. S. 464, 23 W. R. 48. *Yates* v. *White*, 4 Bing. N. C. 283. *The Potomac*, 105 U. S. (15 Otto) 630, per Gray, J. *Smidmore* v. *Australian Gaslight Co.*, 2 N. S. W. Law 219.

(*i*) *Sun Mutual Co* v. *Mississippi Co.*, 5 McCrary (U. S. Circ. Ct.) 477. *Ins. Co.* v. *C. D. Junr.*, 1 Woods (U. S. Circ. Ct.) 72

(*j*) *Mobile Railway Co.* v. *Jurey*, 111 U. S. (4 Davis) 584.

ture of a contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionably subrogated to the right of action of the assured against them. *If insurers assign their subrogated right to person causing loss, it may be defence in assured's action against him.*—The amount which, by the effect of the contract of insurance, and of the payment of a loss under it, the insurers would have a right to recover to their own use from the person whose fault was the cause of the loss, the insurers would have the right to release and assign to such person, who would then have a claim to a deduction on this account from the damages to be recovered against him by the assured. This claim to a deduction does not arise out of any right inherent in such person, but out of the right so derived from the insurers (*k*).

**Policy without benefit of salvage illegal.*—The law is so [* 230] stringent as to the principle of indemnity, that policies without benefit of salvage are in express terms made illegal (*k*). As the doctrine of abandonment is seldom applied to any but marine risks, questions of salvage do not arise so often in fire policies. But the amount of salvage is always an element in the computation of damages by fire, except where the insurers elect to take the salvage and pay in full, reimbursing themselves so far as they can by selling the salvage for what it will fetch.

Position of insurer as to salvage and damage.—Generally speaking, as to salvage the insurer stands in the place of the assured, and can claim all that is saved; and as to damage, the insurer is entitled to use and exercise the ways and means open to the assured for diminishing the loss and obtaining compensation (*l*).

Defences against assured good against subrogated insurer.—An insurer suing the party through whose fault the loss occurred can only assert the right of the assured, and will be subject to any defences or equities which would be good against him (*m*). The insurer stands in no relation of contract or privity with such a party. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in right of the latter (*n*). Thus where damage occurred through contributory negligence, that defence would be an answer to the action of the subrogated insurer. Again, if two ships of the same owner collided by the fault of one to the destruction of the other, the insurers could not sue the owner, since they claim under him (*o*).

Insurer entitled to subrogation against carrier.—As between carrier and insurer the liability to the owner of the goods carried and insured is primarily on the carrier, and the insurers, when they have

(*k*) *The Potomac, ubi supra.*
(*k*) *Allkins* v. *Jupe*, 2 C. P. D. 375, 46 L. J. C. P. 824, 36 L. T. N. S. 851.
(*l*) *Randall* v. *Cockran*, 1 Ves. Sen. 98. *London Assurance* v. *Sainsbury*, 3 Doug. 245, 253. *Castellain* v. *Preston*, *ubi supra.*
(*m*) *Phœnix Co.* v. *Erie Co.*, 117 U. S. (10 Davis) 312.
(*n*) *Ibid.*, 321.
(*o*) *Simpson* v. *Thompson*, 3 App. Cas. 279, 38 L. T. N. S. 1.

[* 231] *indemnified the assured, are equitably entitled to succeed to the right which he had against the carrier. The owner, however, may make the contract of carriage to suit his own interest, and may release the carrier from all liability, but such release or the intention to grant it, must be disclosed to the insurer if it be a material fact which the assured knew, or should have known, would affect the premium or the willingness of the insurers to take the risk (*n*). It has been held in America that a bargain by the carrier to have the benefit of any insurance on goods entrusted to him will not avoid a policy effected without disclosing such bargain (*o*), and in one case the insurers were held to have notice of a bill of lading containing a proviso to the above effect (*p*). But these cases do not seem correctly to apply the rule indicated above and laid down in *Tate* v. *Hyslop*. If goods are insured during transport, it must be material to the insurer to know the nature of the contract of carriage, and whether it contains any variation from the ordinary liabilities imposed by law on carriers, or in fact undertaken by them; and further, even if a carrier can contract himself out of any liability for loss of goods entrusted to him, this is a different thing from bargaining to have the benefit of any insurance effected by the owner. The latter bargain does not amount to a contract by the owner to insure, but an undertaking that if he does so he will release his rights against the carrier. And such a bargain would, in an ordinary case, be a fraud on the insurer, unless it can be said that he has notice of the contract of carriage, since it is directly aimed at defeating the insurer's subrogation (*q*).

[* 232] **Re-insurer.*—Re-insurers in America, on payment of their proportion of a loss, have been allowed to sue in Admiralty against the carrier of the goods injured. The question in any case seems to be merely one of procedure, as a re-insurer is clearly subrogated to the insurer's rights, and so to those of the assured (*q*) and any salvage or benefit thereof (*r*).

Partial insurance and third person primarily liable.—A person partially insured can also sue any party primarily liable for the loss. Such party may not profit by the insurance. But the assured will recover (as to the balance in excess of indemnity) as trustee for the insurer (*s*).

(*n*) *Tate* v. *Hyslop*, 15 Q. B. D. 368 at 377, 54 L. J. Q. B. 592, 53 L. T. 581.

(*o*) *Phœnix Co.* v. *Erie Co*, 117 U. S. (10 Davis) 312. *Jackson Co.* v. *Boylston Co.*, 52 Am. Rep. 728, 139 Mass. 508.

(*p*) *British and Foreign Marine Co.* v. *Gulf Railway Co.*, 51 Am. Rep. 661. And see *Rintoul* v. *New York Central Railway Co.*, 21 Blatch. (U. S. Circ. Ct.) 443.

(*q*) *Defourcet* v. *Bishop*, 18 Q. B. D. at 378–379.

(*q*) *The Ocean Wave*, 5 Bissell (C. Ct. U. S.) 378.

(*r*) *Delaware Co.* v. *Quaker City Co.*, 8 Grant (Penn.) 71.

(*s*) See *Hall* v. *Railroad Co.*, 13 Wall (U. S.) 367, and cases there collected. *Commercial Union* v. *Lister*, *infra*, note (*y*).

Negligence of servants, or municipal authorities. Collision.—If a fire is caused by the negligence of servants of a railway or steamer (*t*), the insurers are entitled to subrogation. So also in case of negligence by municipal authorities (*u*). So also for damage by collision between river steamers (*x*).

Where insurance is less than damage, assured is dominus litis against wrong doer.—Where the amount insured and paid is less than the the value of the subject-matter of the insurance or the damage done thereto, in an action against the person responsible for the damage the assured would be the *dominus litis*, and not obliged to lend his name to the insurers for the purpose of proceedings by them.

Assured must not prejudice insurer's rights.—In such a case the assured should sue for the whole damage, and not release the action collusively or compromise it in any way injuriously to the insurers, and he will be accountable for the proceeds of such action so far as they with the insurance exceed *complete indem- [* 233] nity, and he will be liable for anything done in violation of his equitable duty to the insurers (*y*).

Assured cannot defeat the insurer's right to subrogation or to use assured's name.—In the Australian case of *Smidmore* v. *Australian Gaslight Company*, the insured property was injured by an explosion of gas due to the defendant's negligence. The assured, in consideration of compensation for such of the damage as was not covered by insurance, gave to the defendants an absolute release from all claims of him (the assured) on the defendants, and covenanted not to let any one use his name in bringing any action against the defendants in respect of the said damage. It was held that the insurer, having paid, could sue in the assured's name, whether he liked it or not, and that the release applied only to the uninsured part of the loss, that alone being mentioned in the recitals (*z*). This view seems to be in accordance with the English law (*a*) and with principle, for to make such a bargain after loss is to make away with the salvage in derogation of the duty of "utmost good faith." Though it may not be necessary to disclose matters likely to affect the amount of salvage before loss (*b*), yet, after loss, the assured must not interfere with the salvage in manner prejudicial to the insurer.

No defence to insurers that other parties first liable.—The insurers can

(*t*) *Quebec Fire* v. *St. Louis*, 7 Moore P. C. 286, 1 Lr. Can. Rep. 222.

(*u*) *Reesor* v. *Provincial Insurance Co.*, 33 U. C. (Q. B.) 357 *Commercial Union* v. *Lister*, 9 Ch. App. 483, 43 L. J. Ch. 601. *Darrell* v. *Tibbits*, 5 Q. B. D. 560, 50 L. J. Q. B. 33 42 L. T. N. S. 797, 29 W. R. 66.

(*x*) *The Potomac*, 105 U. S. (15 Otto) 630.

(*y*) *London Assurance* v. *Sainsbury*, 3 Doug. 245, per Wiles, J. *Smidmore* v. *Australian Gaslight Co*, 2 N. S. W. Law 219. *Commercial Union* v. *Lister*, 9 Ch. App. 483, 43 L. J. Ch. 601. *Simpson* v. *Thompson*, 3 App. Cas. 279, 293, 38 L. T. N. S. 1.

(*z*) *Smidmore* v. *Australian Gaslight Co*, 2 N. S. W. Law 219.

(*a*) *Dufourcet* v. *Bishop*, 18 Q. B. D. 378.

(*b*) *Tate* v. *Hyslop*, 15 Q. B. D. 358, 54 L. J. Q. B. 592, 53 L. T. 581.

not plead as a defence to an action against them that other parties, not insurers, are first liable and should be first sued (*c*). In this respect they are like sureties, and, having undertaken to indemnify against the loss of the thing insured, they cannot escape [* 234] from the performance of their *undertaking by showing the cause of its loss to be the fault of a third person.

Money received by assured after payment by insurers, enures to their benefit.—If the assured, after payment by the insurers, obtains by action (or otherwise than by special gift not intended to be by way of indemnity (*b*)), any money (or other indemnity which has a money equivalent (*c*)) which together with the sum received from the insurers exceeds the total value of the property insured, the insurer will be entitled to recover from the assured the amount of such surplus (*d*).

Principle of indemnity explained on insurance by mortgagee.—The principle laid down in *Darell* v. *Tibbitts* was asserted in 1859 in Lower Canada in what seemed a case of first impression (*e*), the facts of which were as follow:—

A man sold land and took a mortgage in lieu of cash from the purchaser, with an undertaking to build and insure as a security. He insured his mortgage interest at £600. The buildings were erected, insured, and burnt; but, before the mortgagee brought his action, the purchaser reinstated (*f*). The Court refused to allow the mortgagee to recover on his policy, and laid down the law as follows:—

1. The contract of insurance being a contract of indemnity, it is the actual loss alone which can be the basis of computation under the contract, and the loss must be determined by the actual state of the case at the time of action brought (*g*).

2. The insurance in the case of a mortgagee insuring the [* 235] house or *corpus* on which the mortgage rests, and *in the possession of the mortgagor or owner thereof at the time of effecting the insurance, is a special insurance of the mortgagee's interest in the thing insured, and is limited to the interest specified in the policy itself (*h*).

3. The special interest thus insured by the mortgagee is not the safety of the whole property insured, but only so much of it as may be necessary to cover his mortgage debt.

(*c*) *Dickinson* v. *Jardine*, L. R. 3 C. P. 639, 18 L. T. N. S. 717, 16 W. R. 1169.
(*b*) *Burnand* v *Rodocanachi*, 7 App. Cas. 333, 51 L. J. Q B. 548, 47 L. T. N. S. 277, 31 W. R. 65
(*c*) *Darrell* v. *Tibbits*, 5 Q. B. D. 560, 50 L J. Q. B. 33, 42 L. T. N. S. 797, 29 W. R. 66.
(*d*) *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.
(*e*) *Matthewson* v. *Western*, 4 Lr. Can. Jur. 57, 10 Lr. Can. Rep. 8.
(*f*) See *Hamilton* v. *Mendes*, 2 Burr. 1198.
(*g*) Parson Merc Law 509.
(*h*) *Matthewson* v. *Western*, 4 Lr. Can. Jur. 57, 10 Lr. Can. Rep. 8.

4. In the present instance the *constitut* or charge was insured to the extent of £400 on the buildings erected on the land sold, as a security for the payment of the *constitut*, is amply covered and protected by the value of the buildings, erected by the debtor of the *constitut*, on the land after the fire had occurred and before action brought, "so that the security of the plaintiff is not in any way impaired or diminished, and consequently no loss in fact has been sustained."

Whilst the mortgagor is not entitled to the benefit of the mortgagee's contract, the mortgagee is not entitled to be indemnified from two quarters (*i*).

Subrogation of insurer to mortgagee's rights.—Subrogation by an insurer to the rights of a mortgagee has been doubted in Canada (*j*), but in this case the insurance was in effect the mortgagor's, being at his costs and charges, and on his interest.

Wilson, J., there well said: "The question can only arise when the mortgagee of his own motion, and at his own risk and expense and for his sole benefit, makes the insurance, and when the insurance-money is as great as or greater than the debt. If the debt is greater, the insurers can never claim more than a right to participate in the debt to the amount greater than or *equal [* 236] to the insurance-money." And the difficulties and solution here suggested have presented themselves to our Courts (*k*). In *Castellain* v. *Preston*, the Court, pressed by the difficulties as to specific performance, refrained (though by a majority so inclined) from laying it down as law that an insurer who has to pay (*l*) the assured (an unpaid vendor), still in possession of the property insured, and having a lien thereon for the purchase-money enforceable notwithstanding the fire, would be entitled to enforce that lien against the purchaser. In that case the insurer got back the insurance money on the ground that the insured had been doubly indemnified, for he had not only obtained the insurance money, but enforced his vendor's lien.

In Canada mortgagee paid by insurer can't recover from mortgagor.—Still, in a somewhat recent Lower Canada case the Courts have held that a mortgagee who has insured property and received the value from an insurer cannot recover from a mortgagor (after he has been paid by the insurer) on the principle of the civil law: "Bona fides non patitur ut bis idem exigatur" (*m*). *Securities in England.*—The English law would let him recover where he paid the premiums out of his own pocket under circumstances which

(*i*) But see *Levy* v. *Merchants Co.*, 52 L. T. 263.

(*j*) *Reesor* v. *Provincial, &c., Co*, 33 U. C. (Q. B.) 357. *Ominum Co.* v. *Canada Ins. Co.* 1 Ontario 494.

(*k*) *Reesar* v. *Provincial Co.*, 33 U. C. (Q. B.) 357. *Ominum Co.* v. *Canada Insurance Co.*, 1 Ontario 494.

(*l*) *Collingridge* v. *Royal Exchange*, 3 Q. B. D. 173, 47 L. J. Q. B. 32, 37 L. T. N. S. 525, 26 W. R. 112.

(*m*) *Archambault* v. *La Mere*, 26 Lr. Can. Jur. 236 (1882).

did not entitle him to charge them to the mortgagor, but he would so recover for the benefit of the insurers, who are entitled on payment to be subrogated to his rights (*n*) independently of stipulation to that effect, though such a term is contained in some American policies (*o*).

The Canadian decision went on *bona fides*, but, while it prevents the mortgage from taking with both hands, it gives the [* 237] mortgagor the benefit of a security for *which, *ex hypothesi* he did not and could not be made liable to pay, and goes counter to the ruling principle of insurance, indemnity (*p*).

Condition in policy for subrogation.—Sometimes insurers contract for subrogation, as in a recent American case before the Supreme Court, where a vessel was valued at $75,000, and insured in all at $50,000 by several insurers. The valuation was specified in each policy, and each policy also contained this provision:—"Whenever this company shall pay any loss, the assured agrees to assign over to the said company all right to recover satisfaction therefor from any other person or person, town or corporation, or the United States Government, or to prosecute therefor at the charge and for the account of the company if requested, and the said company shall be entitled to such proportion of the said damages recovered as the amount insured by them bears to the valuation of the said vessel."

Assignment by insurers to tortfeasor of subrogated rights is a defence.—A collision occurred, the insurers paid the assured their proportion of the loss, and assigned over to the owners of the ship to blame all their right to any damage arising out of the collision. The owners of the injured vessel brought their action for the damage, and the assignment of the insurers' rights was pleaded in defence.

The United States Supreme Court held—

1. That the insurers had no right to more than two-thirds of the damages recovered.

2. That the plaintiff having been equally in fault, only half damages could be recovered, and that of that half only two-thirds could be set off under the assignment (*q*)

[* 238] **Extent of insurers' claim by subrogation where policy valued and where not.*—Insurers are only entitled to damages for an injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation in the policies (*r*); if they be valued policies, in which case the insured is estopped from setting up any other standard of valuation against

(*n*) *Burton* v. *Gore District Mutual*, 12 Grant (U. C.) 156. *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*o*) *New England Fire, &c, Co.* v. *Wetmore*, 32 Illinois 221.

(*p*) See per James, L. J. in *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547.

(*q*) *The Potomac*, 105 U. S. (15 Otto) 630.

(*r*) *The Potomac, supra.*

the insurers (*s*); or if they be not valued, which is a similar case, only to the extent of the indemnity paid by them.

If the assured only gets half his damage as in collision, the insurer, who has insured two-thirds of the whole value, will only get one-third of the damage awarded, as by his contract he was liable for two thirds of the whole, not two-thirds of half the damage (*t*).

Contribution occurs when same interest insured by different insurers.—Contribution takes place where different insurers insure the same interest in respect of the same property and the same perils (*u*). The conditions in a fire policy aim at increasing the occasions for contribution.

And insurers often stipulate that the assured shall furnish the names of other offices with which he has policies, in order that they may have the proposals the same as those other companies, so that policies may be in similar terms and contribution facilitated (*x*).

Insurers' liability joint and several—The assured may, but is not bound to, sue all his insurers together. Or he may recover the whole amount of his damage from one, and let that one seek *contribution to reimburse himself, just as a guaranteed [* 239] creditor has a choice of remedies, and may at his option proceed against the principal or his sureties (*y*).

The total of various policies must exceed loss.—Contribution only can take place where double insurance exists, *i. e.*, where one or more policies have been taken out, the total amount whereof exceeds the total value of the subject-matter insured.[1]

The assured, being entitled only to indemnity, can only recover the amount of his loss. And he is entitled to sue his insurers separately or successively until he has been recouped in full. To such action or actions it is a good defence that the assured has been already indemnified wholly or in part by other insurers.

The insurer, on the other hand, is only entitled to contribution when he has paid. But he can either call in the other insurers as third parties in the assured's action against him, or pay and sue the other insurers for contribution in a separate action.

Same property must be insured.—There is one other condition precedent to the right to contribution, that the same property or interest, or some part thereof, shall have been insured with the several

(*s*) *North-Eastern Insurance Co.* v. *Armstrong*, L. R. 5 Q. B. 244, 39 L J. Q. B. 81, 21 L. T. N. S 822, 18 W. R. 520, doubted in *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, 51 L J, Q. B. 548, 47 L. T. N. S. 277, 31 W. R. 65.

(*t*) So in America, *The Potomac, supra.*

(*u*) *North British and Mercantile* v. *London. Liverpool. and Globe*, 5 Ch. D. 581, per James, L. J., 45 L. J. Ch. 548, 46 do 537, 36 L. T. N. S. 629

(*x*) *Pendlebury* v. *Walker*, 4 Y. & C Ex. 424, 441.

(*y*) *Stacey* v. *Franklin Fire*, 2 Watts & Serg (Penn.) 506.

[1] Owners shipped goods by a carrier and insured it Carrier had policies covering cargoes of its steamer, containing clause limiting insurance to interest of insured. Held, not to be double insurance, and the shipper's insurers could not make the carrier's insurers contribute to their loss. *Royster* v. *Roanoke Steamboat Co.*, 26 Fed Rep. 492.

insurers (*z*), who claim contribution *inter se;* and the usual condition as to contribution only means that there is to be a limit to the liability of the several offices where the respective offices are legally liable to contribute to the same loss in respect of the same fire (*a*).

Difference between contribution and subrogation.—Contribution is distinct and different from subrogation (*b*), and resembles [* 240] the remedies between *co-sureties, whereby the liability of each may be equalized or made proportionate. For subrogation to arise the assured must have concurrent remedies against the person causing the loss and against the insurer. Thus he may have a claim against the bailee of his goods by law, custom, or contract, and also a claim against his insurers by contract. There the bailee cannot claim against the insurer, but the insurer can in satisfaction of the loss claim against the bailee, who is primarily liable, and stands in a position analogous to that of a principal debtor whose debtor is guaranteed.

In contribution no one insurer is more liable than any other, no more than the whole loss can be recovered, and the aim of contribution is to distribute the loss among the different persons liable, so as to give each and all a diminution of their individual loss; whereas in subrogation the aim is to shift the loss on to those who would have been liable if there had been no insurance.

If the bailee insures his liability and the bailor insures his interest in the goods, the bailor's insurer is entitled to recover from the bailee or his insurer the whole damage, not a proportionate part, since each only represents his assured, and the right of the bailor against the bailee is not to contribution merely, but to complete indemnity for the loss of his goods (*c*).

Scottish Amicable v. *Northern Assurance.*—In a recent Scotch case (*d*), premises on which there were several mortgages were insured under four policies in the name of the first mortgagees *primo loco*, and of the mortgagors in reversion. Each policy contained a contribution clause identical with that in *North British and Mercantile* v. *London, Liverpool, and Globe*, already cited. The premises [* 241] were also insured in favour of *subsequent mortgagees in the first place, and the mortgagors in reversion by policies containing a similar clause. The mortgagors paid for all the policies, and on a fire occurring the first mortgagees sued on their policies. The insurance companies objected that the other three companies were not called on for contribution. The Court overruled the objection on the grounds—

(*z*) *Tuck* v. *Hartford*, 56 New Hamp. 326, where two policies were taken out by mortgagor, one by mortgagee on own interest. Contribution on value of the equity of redemption.

(*a*) *North British and Mercantile* v. *London, Liverpool and Globe*, 5 Ch. D. 569, 582, per James, L. J., 36 L. T N. S 269, 46 L. J. Ch. 537.

(*b*) Same case, 583, per Mellish, L. J.

(*c*) *North British and Mercantile* v. *London, Liverpool and Globe, ubi supra.*

(*d*) *Scottish Amicable* v. *Northern*, 11 C. S. C. (4th series) 287, 12 Sc. L. R. 189.

(1) That the plaintiffs had no right of action against the insurers on the last three policies, but only on the first four.

(2) That the words "same property" in the contribution clause meant the same proprietary interest, "the particular security, estate, or interest, which the insurance was to protect, and no other."

(3) That the first mortgagees had insured their own interest, and that no subsequent insurance by other mortgagees could diminish that interest.

Per Lord M'Laren. Insurers of first mortgagees cannot claim contribution from insurers of second mortgagees, if the policies cover several interests of the different mortgages.—The opinion of the Lord Ordinary, which was approved by the Court of Session, was as follows (*e*):—"The clause of contribution can have no other object or purpose than in the case supposed to reduce the liability of the subscribing companies to that of underwriters, that is, a liability under which the assured should be entitled to recover the full amount of his claim in payments from the several contributories, but should not be entitled in case of partial loss to throw the loss on one or more contributories to the exclusion of the others. My interpretation of the clause carries out this object. Under the defenders' contention the pursuers would not recover the full amount of their claim, because their view involves the division of the loss into seven shares, of which the pursuers would only recover four. The division to be applied to the sum assured by the Northern Company, if the contract *is a fair one, must be the ratio of the ag- [* 242] gregate liability of the contributories to the actual loss.

The defender's proposal is to increase the division by adding to it the liability of persons who are not contributories. It is, I think, a good reason for rejecting their contribution, that it would enable insurance companies to evade fulfillment of their obligations. Another reason for rejecting it is that under it the right of the assured would be liable to be diminished by subsequent acts of parties not under their control. In the present case, for example, it is said that a second bondholder [mortgagee], by effecting his insurance, has diminished the claim of the first bondholder to a proportionate extent. A third reason against the defenders' contention is that in the case of a total loss it leads to the result that the indemnity is to be shared between the first and second bondholders in proportion to the amount of their insurance, though in equity the first bondholder, if covered by insurance, ought to recover to the extent of his bond, and the second bondholder ought only to recover the difference between that sum and the worth of the property, that difference evidently being the limit of his insurable interest." And the obligation of the later companies is to indemnify the deferred creditor should he suffer from the consequences of a fire; and if this creditor does not suffer loss, there cannot be brought against them any claim for indemnification (*e*). They are to make up loss

(*e*) 11 C. S C. (4th series) 290.
(*e*) Same case, 294, per Lord Craighill.

to the party whom they have assured; they are under no obligation to idemnify or to enter into arrangements for indemnifying a preferred creditor.

The plaintiffs were suing for what was theirs, and not in the reversioners' interest.

Scottish Amicable v. Northern Assurance discussed.—The case turns on what was meant to be insured—the property itself or the mortgagee's interest in each case. If the former, which is sup-
[* 243] ported by the fact *that the mortgagor paid the premiums, contribution would seem proper. But, on the other hand, this would enable the mortgagor to diminish the first mortgagee's security under the first policies; and the only way to keep up his title is to let him recover on the policies, which are his security, or else to reinstate, or thirdly, to give the insurers paying him subrogation against the mortgagor. In this case the unhappy mortgagor, by providing a security for his mortgagee, would be simply giving the insurers a right of recourse against himself. But reinstatement would be the true solution, since thereby—

The first and puisne incumbrancers would have their security preserved.

The debtors would not be liable to subrogation.

The insurers could contribute rateably to reinstatement without possibility of claim (*f*).

In the case under discussion, if, after satisfying the claims of the mortgagees on their several policies, there still remained a balance of loss, that would be damage to the mortgagors' interest, and *quoad* that all the companies would contribute, that being, if the Court were right, the only interest common to all the policies.

The Scotch Courts hold that the assured cannot select his debtor, but that insurers of the same interest may make their right to rateable contribution available in a question with the common creditor (*g*). In England the assured can sue which insurer he chooses, but contribution may be obtained by means of Ord. xvi. r. 48 of the Rules of the Supreme Court, 1883.

Contribution contrasted with subrogation.—Contribution differs from subrogation in several respects. In the first place, it im-
[* 244] plies, as before *mentioned, more than one contract of assurance each of which undertakes a similar, if not identical, liability in respect of the same subject-matter and the same interest therein. Secondly, the amount of the insurances must exceed the value of the property or the damage done to it. When these circumstances exist, the insurers by contribution distribute the actual loss in such a way that each bears his proper share.

The one thing which contribution has in common with subroga-

(*f*) See Lord Young's opinion, *ibid.*, 295, in which he takes the same view of insurance on buildings as did James, L. J., in *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. 787, 29 W. R. 547

(*g*) 11 C. S. C. (4th series), at p. 303, per Lord Justice-Clerk Moncreiff.

tion is to reduce the indemnification of the assured within the bounds of real indemnity.

For subrogation there need not be more than one policy, nor need that offer complete indemnity. All that is necessary is that there should be, besides the insurer, another person liable to the assured, or some other means of indemnity open to the assured other than and besides recourse to his insurer. In such a case the principle of subrogation will apply, and will entitle the insurer, not, as in contribution, merely to a rateable reduction of the indemnity paid by him, but to the enforcement of the assured's rights against others to the full extent of that indemnity.

Consignor and consignee.—If the consignee takes out policies on goods held by him in trust (in the mercantile sense), and the consignors effect policies, each on his own goods (*h*), or if the consignee effect policies also in their name, this will be a case for contribution if the consignor's policy is so drawn as to cover the merchandise and not merely the consignor's interest therein (*i*).

Policy may be shown not to be a contributing one.—But though a policy on the face of it is a contributing policy, the course of dealing may be given in evidence to show that it was not so intended when the *policy in question is not a contract be- [* 245] tween the parties to the action (*k*). In some cases a floating policy has been held not liable to contribute rateably with specific policies covering the whole amount (*l*), and in others it has been held liable (*m*).

Condition as to contribution.—The condition as to contribution usually provides that the insured shall not be entitled to recover from the company any greater proportion of the loss or damage than the amount insured bears to the whole sum insured on the property, whether such insurance be by specific or by general or floating policies and without reference to the solvency or the liability of other insurers (*n*). The insurers are liable in the same ratio that their risks bear to the total risk (*o*).

It is doubtful whether in case of an insurance against fire on goods, with a clause stipulating for the payment of only a rateable proportion in case of another insurance, if the assured procures another insurance on the same risk, and the loss is less than the whole amount insured, he can recover the whole loss from the first insurer, or only a *pro rata* payment from each (*p*).

(*h*) *Waters* v. *Monarch*, 5 E. & B 870, 25 L. J. Q. B. 102, 26 L. T. 217, 4 W. R. 245, 2 Jur. N. S. 375. *Home Insurance Co.* v. *Baltimore Water Co.*, 93 U. S. (3 Otto) 527, 541.

(*i*) *Robbins* v. *Fireman's Fund Insurance Co.*, 16 Blatch. (C. Ct. U. S.) 122.

(*k*) *Lowell Co.* v. *Safeguard Fire*, 88 N. Y. 591 (1882).

(*l*) *Fairchild* v. *Liverpool and London*, 51 N. Y. 65.

(*m*) *Merrick* v. *Germania*, 54 Penn. 277.

(*n*) *Johnson* v. *North British and Mercantile*, 1 Holmes (C. Ct. U. S.) 117.

(*o*) *Barnes* v. *Hartford Co*, 8 McCrary (U. S. Circ. Ct.) 226.

(*p*) *Stacey* v. *Franklin Fire*, 2 Watts & Serg. (Penn.) 506, 543.

[* 246] *CHAPTER XI.

CONDITIONS AS TO AVERAGE.

Two kinds.—Conditions on this subject are obscure and little understood. They take two forms—

(1) A condition declaring the property insured to be subject to the conditions of average.

(2) A condition declaring that if any other subsisting insurance or insurances effected by the insured or any other person, covering any property by the policy in question insured, either exclusively or together with any other property in and subject to the same risk, should be subject to the conditions of average, the insurance on such property under the policy should be subject to the conditions of average in like manner (*a*).

Condition. Average.—The aim of those conditions is to prevent under-insurance, just as conditions relating to contribution seek to obtain the benefit for each insurer of another insurance. Each particular assured being bound by the condition of his particular policy, it results that where several insurances have been made, indirect compulsion can be put upon persons not bound to a particular insurer through the insurer with whom they have contracted, in the interests of the general body of contributing insurers.

Proportion payable.—The conditions of average are as follows:—If property is declared subject to average, and the property covered at the time of fire exceed the sum insured at the time of the [* 247] fire, the assured will receive on his *insurance, not the whole amount of the loss or damage, but only such portion thereof as ascertained by a rule-of-three sum, in the following form:

Value of property covered: insured amount :: damage done: damage payable.

The consequence of this rule is to make the assured his own insurer as to a rateable portion of the loss, determined by the ratio between the value of the goods at risk at the date of the fire and the amount insured thereon. The aim of the condition is to provide full insurance.

Policy subject to average and specific policy.—If the property included in a policy subject to average is covered by other and more *specific* insurance, which applies at the time of fire only to part of the property insured by the first policy and to no other property, then the policy subject to average only insures the property as to an excess above the specific policies, and that excess will be, if need be, subject to average.

(*a*) *North British and Mercantile* v. *London, Liverpool, and Globe*, 5 Ch. D. 569, 45 L. J. Ch. 548, 46 do. 537, 39 L. T. N. S. 629.

Specific insurance.—By specific insurance is meant a policy or policies whereby the amount insured is payable irrespective of the value of the property within the risk at the time (*b*).

If the specific insurances cover the whole property, the insurer, by a floating policy, will not have to contribute, nor will the average stipulations bring him under any liability (*c*).

Buildings and furniture separately insured in same policy.—In an insurance on buildings for £2,000, and furniture for £2,000, separately valued, but in the same policy, it was stipulated that, in case of any other insurance thereon, the assured should not recover on this policy any greater proportion of the loss than the amount assured by the insurer should bear to the whole amount assured thereon. A second insurance was taken out on building and furniture generally for *£2,000, and in this case the [* 248] first insurers were held bound to pay two-thirds of the loss caused by a fire, and not permitted to contend that the second insurance, being on buildings and furniture equally, must operate to its full extent on both or either (*d*).

Two-thirds clause.—While the conditions of average are inserted to ensure full insurance on fluctuating amounts of goods, and to prevent policy-holders from covering by their policies goods in excess of the amount insured thereby, a similar condition is inserted in some, especially mutual marine policies, and in Canada and the United States in policies on houses, &c., in the shape of a two-thirds clause, which works like the average condition, as will presently be seen, and under which the amount of indemnity, whatever the actual amount insured, is restricted to two-thirds of the value of the subject-matter at the time of the fire. In such a case the value of house or goods may fluctuate, and the amount recoverable will never be the actual damage done, but only a sum not exceeding two-thirds the cash value of the premises, and in any event not exceeding the amount on which premium is paid. Thus if a building were insured for £1,500, and it was totally destroyed by fire, being at the time worth £1,800, the assured would under such a policy recover, not £1,500, but £1,200 only (*e*).

Application of two-thirds clause where separate insurance of separate properties.—Where a separate insurance is effected on separate properties, and the two-thirds value clause applies, the insured can recover only the two-thirds of the damage done to the particular property injured, and not two-thirds of the whole insurance upon it. Thus if a house and furniture were insured for £1,500, the house at £1,000 and furniture at £500, and the *former [* 249] were wholly destroyed, the amount recoverable would not

(*b*) Bunyon Fire Ins. 2 and 144 *et seq.*

(*c*) *Fairchild* v. *Liverpool and London*, 51 N. Y. 65. *Per contrà*, *Merrick* v. *Germania*, 54 Penn. 277.

(*d*) *Unitarian Congregation* v *Western Assurance Co.*, 26 U. C. (Q. B) 175.

(*e*) *Williamson* v. *Gore District Mutual*, 26 U. C. (Q. B.) 145. See *Post* v. *Hampshire Mutual*, 58 Mass. (12 Metcalfe) 555.

be £1000, two-thirds of £1500, but two-thirds of the £1000, that being the limit of indemnity for the house (*f*).

Different subjects insured at separate amounts in same policy.—Where different subjects are insured at separate amounts specified under one policy, containing a clause that the company shall be liable to pay to the assured two-thirds of all such loss or damage by fire as shall happen, not exceeding the aggregation of the amounts insured, and amounting to no more on any one of the different properties than two-thirds of the value of each at the time of loss, and not exceeding on each the sum it is insured for, the policy is to be treated as a separate insurance upon each subject of insurance, and the company is liable only for two-thirds of the loss on each subject, notwithstanding that the loss on some subjects is less than the amount insured thereon, and the whole loss less than the whole amount insured (*g*).

Difference of average in marine and fire.—Average in fire policies is quite a different thing from average in marine policies. In the latter it means a rateable contribution to the damage caused to part of the adventure by a common peril, *i. e.*, the whole adventure is dealt with *in solido*, and any loss is treated as lost by all, to be apportioned among the co-adventurers or their insurers, if any; whereas the conditions of average in fire assurance aim at lessening the indemnity payable to the assured.

Average clause in fire policy.—The average clause in a fire policy works in the same way as the rule for estimating the amount of the insurer's liability on a valued sea policy. In the latter, if an adventure be valued, the insured is estopped in case of loss from saying that the value exceeds the amount in the policy.

[* 250] *And if he has a partial loss, he will only receive an indemnity for such loss calculated by the following proportion. As the actual value is to the actual loss, so is the insured value to the sum recoverable.

Thus, if a ship worth £15,000 be valued at £10,000, and suffer £5000 worth of damage, not that sum, but £3333 6*s.* 8*d.* will be recovered (*h*).

So if a fire policy subject to average the policy be for £10,000 on goods, and £15,000 worth of goods be within the risk at the time of the fire, the assured will only get two-thirds of the amount of his loss.

Goods in lighters.—A marine average loss on a valued policy would be adjusted in just the same way. And the same principle is applied to policies on goods afloat in lighter canal boats, &c. (*i*). The amount at risk on the day of loss in all the owner's boats con-

(*f*) *M'Culloch* v. *Gore District Mutual Fire Insurance Co.*, 32 U. C. (Q. B.) 610.

(*g*) *King* v. *Prince Edward City Co*, 19 U. C (C. P.) 134.

(*h*) *Lewis* v. *Rucker*, 2 Burr. 1167, 1171, per Lord Mansfield. *Irving* v. *Manning*, 1 H. L. C. 287, 305, 2 C. B. 784.

(*i*) *Crowley* v. *Cohen*, 3 B. & Ad. 478, 1 L. J. N. S. K. B. 158.

taining goods covered by the policy is taken (*k*), and the amount payable for damage to any lighter is calculated as follows:—As the whole value of goods afloat is to the damage done, so is the whole insurance to the amount payable.

Thus if there be £10,000 of goods afloat, and the policy is for £5000, the damage done being £1000, the amount payable will be £500.

In the policies against land risks each different loss must be declared separately as it arises. But in marine policies the losses of each voyage are declared at the end of the voyage, and may be lumped together (*l*).

(*k*) *Joyce* v. *Kennard*, L. R. 7 Q. B. 78, 41 L. J. Q. B. 17, 25 L. T. N. S. 932, 20 W. R. 233. See also *Buchanan* v. *Liverpool, London and Globe Co.*, 21 Sc. L. R. 696.

(*l*) *Stewart* v. *Merchants' Marine Co.*, 16 Q. B. D. 619, 55 L J. Q B. 81, 53 L. T. 892, 34 W. R. 208.

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*CHAPTER XII.

REINSTATEMENT.

Option to reinstate. Effect of.—The position of insurers under a contract of insurance containing an option to reinstate has been well laid down as follows:—

The insurers, in case of liability arising against them on their contract, had an option as to the manner in which they would discharge their liability. One mode looked to the compensation of the insured by the payment of damages for his loss, the other to the restoration of the subject of insurance to its former condition. It could not have been contemplated by the parties that both methods of performance were to be pursued. The selection by the insurers of one of those alternatives necessarily constituted an abandonment of the other (*a*). The election of the privilege of restoration involves the rejection, not only of the right to discharge its liability by the payment of damages to the insured, but also those provisions of the contract having reference to that method of performance. From the time of such election the contract between the parties becomes an undertaking on the part of the defendant to build or repair the subject insured, and to restore it to its former condition, and the measure of damages for a breach of the substituted contract does not necessarily depend on the amount of damage inflicted by the peril insured against (*b*).

[* 252] If, therefore, the insurers elect to reinstate and their *reinstatement is not satisfactory, they cannot, it seems, plead refusal by the assured to arbitrate as an answer to a claim for damages in respect of improper reinstatement (*c*).

Reinstatement. 14 Geo. III. c. 78, s. 83.—By the old Metropolitan Building Act (*d*) it is provided that insurers may, "upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings, which may thereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings, have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insur-

(*a*) *Times Co.* v. *Hawke*, 1 F. & F. 406, 28 L. J. Ex. 317.
(*b*) *Wynkoop* v. *Niagara Fire*, 43 Am. Rep. 686, 91 N. Y. 478, and cases there cited. *Morell* v. *Irving Fire*, 33 N. Y. 429.
(*c*) *Wynkoop* v. *Niagara Fire*, *supra*.
(*d*) 14 Geo. III. c. 78.

ance-money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings so burnt down, demolished, or damaged by fire, unless the party or parties claiming such insurance-money shall within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the insurers that the insurance-money shall be laid out and expended as aforesaid, or unless the said insurance-money shall in that time be settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of the insurers."

Building insured in specie.—A building is insured as a building. It is not merely the material that is insured, but the beneficial interest of the assured therein (*e*), and therefore, to prove a total loss, absolute destruction of the material need not be proved. It is enough to show that the building has lost its identity and specific character (*f*). *This is in accordance with the rule laid [* 253] down by the Courts as to marine insurance (*g*).

Scope of s. 83.—It was for long thought that this section applied only to property within the bills of mortality, but in 1864 the Lord Chancellor, Westbury (*h*), held that it was of general and merely of local application. It was at the same time decided that the power of reinstatement under the Act applied only to houses and buildings, and such fixtures as would pass by the conveyance, and therefore not to trade fixtures removable by the tenant. The right of reinstatement in any case only exists by statute or special contract, and in no way forms part of the common law of insurance (*i*). The whole of the Metropolitan Building Act, except ss. 83, 86, is repealed by subsequent statutes (*k*).

Under the statute the insurer is authorized and required to reinstate in all cases of suspicion that the assured has been guilty of fraud.

Insurer's obligation to reinstate.—Further on the application of any person interested (*l*) in the property, the insurer must reinstate, unless the parties interested come to terms. Any one having any right or interest to or in the premises (*m*) can thus, if he has notice of an insurance, stop the proceeds thereof, and insist on their being applied to the restoration of the premises in respect of which they have been received. It was probably intended by this Act to pre-

(*e*) *Castellain* v. *Preston*, 11 Q. B. D. 380 at 397, per Bowen, L. J., 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*f*) *Huck* v. *Globe Insurance Co.*, 127 Mass. 306, 34 Am. Rep. 376. *Williams* v. *Hartford Co.*, 35 Am. Rep. 77.

(*g*) *Insurance Co.* v. *Fogarty*, 19 Wall. (U. S.) 644. *Hugg* v. *Augusta Insurance Co.*, 7 How. (U. S.) 565; and see *Roux* v. *Salvador*, 3 Bing. N. C. 266.

(*h*) Ex parte *Goreley*, 4 De G. J. & S. 477, 34 L. J. Bkcy. 1, 13 W. R. 60, 11 L. T. N. S. 319, 5 N. R 22, 10 Jur. N. S. 1085.

(*i*) See *Wallace* v. *Insurance Co.*, 4 Louis. O. S. 289.

(*k*) 7 & 8 Vict. c. 84; 18 & 19 Vict. c. 122.

(*l*) *Paris* v. *Gilham* (1813), Cooper 56, per Grant, M. R.

(*m*) See Ex parte *Gorley*, *supra*. *Vernon* v. *Smith*, 5 B. & Ald. 1.

vent landlords who had insured from receiving the whole proceeds of the property and then insisting on their rent, or tenants [* 254] from insuring *the freehold value and by receipt thereof exercising a kind of power of sale of premises in which they had but a limited interest (*n*).

In *Rayner* v *Preston* (*o*) James, L. J., expressed his opinion that the effect of this Act was to make the insurance on the property on behalf of all interested; and he said that he had never known any question raised as to the interest of the tenant. But in *Castellain* v. *Preston* (*p*) Bowen, L. J., emphatically dissents from this view.

Notice to reinstate.—If the notice to reinstate is not given to the insurance company before the money is paid over, it comes too late, and the money cannot be followed by the person giving such notice (*q*), unless he is a mortgagee (*r*), nor can he make any claim on the insurers in such a case.

If the insurers are given notice and will not reinstate, the remedy is by *mandamus* (*s*). The remedy is open, not only to the landlord as in the case below, but to every person interested.

Reinstatement without notice.—The insurers can reinstate on their own account independently of quarrels between persons interested in the property. And our Courts would probably, as in Scotland (*t*), refuse an injunction to restrain the insurers from reinstating in such a case; for "the duty of the insurance company to [* 255] see the money so laid out *is twofold—first, in the interest of the public to prevent fraud; and secondly, in their own interest, because no more ought to be laid out than was sufficient to erect buildings of the former character and description (*t*).

Interpleader by insurer.—It was held that the insurance company could interplead in a case where the landlord brought an action against them on the policy, and the tenant required them to re-instate (*u*).

Insurer not bound to pay landlord who reinstates.—A landlord can not, under 14 Geo. III. c. 78, s. 83, rebuild his houses and then re-

(*n*) See *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557, and *Niblo* v. *North America Insurance*, 1 Sandford (N. Y. Ch.) 551.

(*o*) *Rayner* v. *Preston*, 18 Ch. D. 15, 50 L J. Ch. 472, 44 L. T. N. S. 87, 29 W. R. 547.

(*p*) 11 Q. B. D. 399.

(*q*) *Edwards* v. *West*, 7 Ch. D. 858, 47 L. J. Ch. 463, 26 W. R 507. *Leeds* v. *Cheetham*, 1 Sim. 146. *Lees* v. *Whiteley*, 2 Eq. 143, 35 L. J. Ch. 412, 14 L. T. N. S. 472.

(*r*) Conveyancing Act, 1881.

(*s*) *Simpson* v. *Scottish Union*, 8 L. T. N. S. 112, 32 L. J. Ch. 329, 1 H. & M. 618, 11 W. R. 459, 9 Jur. N. S. 711, 1 N. R 537. *Reynard* v. *Arnold*, 9 Ch. App 386.

(*t*) *Bissett* v. *Royal Exchange*. 1 C. S. C. (1st series) 175.

(*t*) *Simpson* v *Scottish Union*, 1 H. & M. 618, 32 L. J. Ch. 329, 8 L. T. N. S. 112. 11 W. R 459.

(*u*) *Paris* v. *Gilham*, Cooper Ch. Ca. (1813) 56.

quire the insurance company to pay for them. Nor can a tenant who has covenanted to insure, and has mortgaged his interest, rebuild and then claim the policy-moneys in reduction of the cost of rebuilding as against such mortgagee (*x*).

Condition in policy as to reinstating.—Notwithstanding the Act, fire policies usually, if not invariably, contain a condition as to reinstatement, giving the insurers an option to reinstate if they so think fit. This condition, as usually drawn, is not, we think, merely declaratory of the power possessed by the insurers, under s. 83, to reinstate under circumstances of suspicion, but enlarges their power, and enables them to reinstate when in their discretion they think proper. The reservation of this option is as old as the case of *Sadlers Company* v. *Badcock* (*y*).

When and how insurers must reinstate.—If the insurers do not rebuild within a reasonable time after signifying their election to reinstate, they may be sued on the policy (*z*).

If the insurer undertakes to reinstate, he must either make the new buildings as good as the old, or *expend all [* 256] the policy-moneys in a proper manner on the rebuilding (*a*). If he fails in this, he is liable to an action by the assured for the defective quality of the work, and must compensate him for it, but not to an injunction restraining him from rebuilding improperly (*b*).

Reinstatement where total or partial loss, and where things cannot be replaced in statu quo.—Where a fire policy contains a clause that the company may reinstate damaged or restored property, the company may, if the property is destroyed, replace the things by others which are as good. If the goods insured are not destroyed, but only damaged, the company may restore them to the place and condition they were in before the fire, and if the clause says nothing about locality, and the things insured cannot be put back where they were before the fire, the assured may require the company to reinstate within a reasonable distance of the former locality (*c*).

In *Alchorn* v. *Savile* (*d*), a case in which the provisions of the Building Act made it impossible to rebuild the house as it was before the fire (*e*), it was held that the company might be sued for

(*x*) *Simpson* v. *Scottish Union*, *ubi supra*. *Gordon* v. *Ingram*, 23 L. J. Ch. 478.

(*y*) 2 Atkyns 554.

(*z*) *Home Mutual* v. *Garfield*, 14 Am. Rep. 27, 60 Illinois 124.

(*a*) *Parker* v. *Eagle*, 75 Mass. (9 Gray) 152. *Cf. Insurance Co.* v. *Hope*, 58 Illinois 75, 11 Am. Rep. 48, and (in Scotland) *Sutherland* v. *Sun Fire*, 24 Scot. Jur. 440, 14 C. S. C. (2nd series) 775.

(*b*) *Home Insurance* v. *Thompson*, 1 U. C. (Err. & App.) 247.

(*c*) *Anderson* v. *Commercial Union Assurance*, 55 L. J. Q. B. 146, 34 W. R. 189. *N. S. W. Bank* v *Royal Ins. Co.*, 2 N. Z. (Sup. Ct.) 337.

(*d*) 4 L. J. O. S. Ch. 47. Reported also 6 Moore C. P. 202 note.

(*e*) See also *Brown* v. *Royal*, 1 E. & E. 853, 33 L. T. 134, 7 W. R. 479, 28 L. J. Q. B. 275, 5 Jur. N. S. 1255. *Hall* v. *Wright*, E. B. & E. 746. Pollock on contracts, 376 (3rd ed.).

compensation for the injury sustained by reason of the inferior value of the premises erected by the company. In that case, the Vice-Chancellor, said: "The insurance company acted under a mistake when, instead of paying the sum insured, they elected to rebuild the premises. *Insurers must put property in statu quo, or pay.* They could not place their property in the same situation as that in which it was before the fire. The Building Act pre-
[* 257] vented them doing so. In truth, therefore, they *had no option: they ought to have paid the money" (*f*). In America election to rebuild is held to amount to a contract to rebuild (*g*), (1).

If the insurers do not reinstate properly, the assured is not bound to accept the building. They cannot put up what they like in lieu of the building destroyed, but must put it up as it was before (*h*).

Fire during reinstatement.—If they do elect to reinstate, and a fire occurs during reinstatement, it would seem that the company are their own insurers till the reinstatement is complete, and must commence reinstating *de novo*, and cannot charge the assured with the cost of the second fire (*i*). And even if this were not so, in cases of partial destruction the insurers would still be liable for the balance of the amount insured and not expended in reinstatement.

Assured can't rebuild and claim against company.—If the insurers do elect to reinstate, the assured cannot refuse to let them do so and rebuild himself, and claim against them (*j*). They have the right so to elect under the statute or policy, or both. This applies equally to insurance on chattels (*k*).

Allowance new for old.—In America no allowance new for old is permitted. In Ireland the contrary seems to have been decided (*l*).

Agreement between landlord and tenant as to rebuilding.—If a landlord effect an insurance, and there is a collateral agreement between him and the tenant that he shall apply the insurance-money in rebuilding the premises, such an agreement will be good without any new consideration on the tenant's part beyond his accept-
[* 258] ance of the lease, and probably without being *put into

(*f*) See *Brady* v. *North-Western Insurance Co.*, 11 Mich. 425.

(*g*) *Morell* v. *Irving Insurance Co.*, 33 N. Y. 429. See also *Ryder* v. *Commonwealth*, 52 Barb. (N. Y.) 447. *Times Co.* v. *Hawke*, 1 F. & F. 406, 28 L J. 817.

(*h*) *Alleyn* v. *La Compagnie de Quebec*, 11 Lr. Can. Rep. 394.

(*i*) *Smith* v. *Colonial*, 6 Victoria L. R. 200.

(*j*) *Beals* v. *Home Insurance Co*, 36 N. Y. 522.

(*k*) *Anderson* v. *Commercial Union*, 55 L. J. Q. B. 146, 34 W. R. 189.

(*l*) *Brinley* v. *National*, 52 Mass. (11 Met. 195. *Vance* v. *Foster*, 1 Ir. Circ. Rep. 47-51.

(1) Company elected to repair partial loss to frame building, after election city ordinance prohibited erection of frame buildings, so to repair company would have been obliged to use more expensive materials. Held, there was no excuse for not repairing, and the owner being obliged himself to repair with brick, could recover the cost together with damages for delay, including the rental value. *Philada. Fire Assn.* v. *Rosenthal*, 108 Pa. St. 474.

writing (*l*), and the landlord would thereby be under an obligation to apply the proceeds of the said policy towards reinstatement.

Election to reinstate.—The effect of an election to reinstate is to make a contract to reinstate, and to put the insurer into the same position as if he had originally contracted to do so. If reinstating is at the time of election lawful and possible, but subsequently becomes impossible, the insurers will be liable in damages as for breach of a contract to reinstate (*m*).

Order by assured on insurers to pay third person.—Acceptance by the insurer of an order by the assured to pay the loss, if any, to a third person will not affect the right statutory or contractual of the insurer to reinstate, such order operating merely as an assignment of the claims of the assured under the contract (*n*).

Election.—But if the insurers once agree to pay, their election to reinstate is gone, and they will not subsequently be allowed to exercise it (*o*).

(*l*) Pollock Contracts 380 (3rd ed.).

(*m*) *Brown* v. *Royal Insurance Co.*, above cited, Erie, J , dissenting.

(*n*) *Tolman* v. *Manufacturers' Insurance*, 55 Mass. (1 Cush.) 73.

(*o*) *Scottish Amicable Association* v *Northern Assurance*, 21 Sc L. R. 189, 11 C. S. C. (4th series) 287. And see *N. S. W. Bank* v. *Royal Ins. Co.*, 2 N. Z. (Sup Ct) 337.

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*CHAPTER XIII.

RE-INSURANCE.

Insurer has sufficient insterest to re-insure.—A contract to insure (*a*) gives the insurer an insurable interest which will support a re-insurance (*b*) to the full amount of his liability on the original policy. French authorities hold that his interest is less than that of the assured by the amount which he has received in premium, since that, having been received, is not at risk (*c*). But the real question is not what has been received, but what may have to be paid. If the assured has no insurable interest his insurer has none to re-insure (*d*).

Nature of re-insurance.—Re-insurance is only a modification of the contract of insurance, and such as is within the powers of a company authorized to make contracts of insurance. It is, in fact, insurance by the first insurer of his interest in the risk created by his contract to insure (*e*). Like the original contract, it insures the goods, buildings, or lives first insured, though the interest in the two insurances differs (*f*). Where a form of insurance is *ultra vires*, the same applies to that form of re-insurance (*g*); and it may therefore be doubted where a corporation not authorized to take marine risks could re-insure a marine risk against fire (*h*).

[* 260] *Company being wound up unable to re-insure.*—A company for whose winding up an order has been made cannot effect any more policies, whether of insurance or re-insurance. In such a case re-insurers by any policy would probably not be bound to do more than return the premiums, if any, paid to them (*h*).

Assured not privy to re-insurance.—The contract being between the re-insured and the reinsurer, the assured has nothing to do with it except so far as it guarantees him against default by his own in-

(*a*) *Mackenzie* v. *Whitworth*, 45 L. J. Ex. 233, L. R. 1 Ex. D. 36, 33 L. T. N S. 655, 24 W. R. 287.

(*b*) *New York Bowery* v. *New York Fire*, 17 Wend. (N. Y.) 359. *Mutual Safety Co.* v. *Hone*, 2 N. Y. (Comstock) 235.

(*c*) Pothier, par Dupin, vol. 4, p. 450 (1835 ed.).

(*d*) *Colonial Insurance Co.* v. *Adelaide Marine Co.*, 12 App. Cas. 135.

(*e*) *Uzielli* v. *Boston Insurance Co.*, 15 Q. B. D. 17.

(*f*) *New York Bowery* v. *New York Fire*, 17 Wend. (N. Y.) 359. *Crowley* v. *Cohen*, 3 B. & Ad. 488, per Patteson, J.

(*g*) Same case, 1 L. J. N. S. K. B. 158.

(*h*) *Imperial Marine* v. *Fire Insurance Corporation*, 4 C. P. D. 166, 48 L. J. C. P. 424, 40 L. T. N. S. 166, 27 W. R. 680.

(*h*) *Carrington* v. *Commercial Fire*, 14 N. Y. Sup. Ct. (1 Bosw.) 152.

surer (the re-insured), and he cannot sue on it (*i*).[1] But the re-insurer's liability would be discharged by payment to the assured of the amount of his loss. *In America liability of re-insurer not affected by insolvency of re-insured.*—And in America, but not it seems in England, the financial condition of the re-insured is not to be taken into account in the computation of the amount to be paid on a policy of re-insurance, nor is insolvency of the re-insured any defence to an action thereon (*k*). *Unless provided for.*—But special exception may be made, excluding this rule (*l*). And the words, "to pay as may be paid thereon," would seem to exclude liability in case the re-insured is insolvent. The result of the American view is to make a policy of re-insurance in the absence of special stipulation a guarantee of the solvency of the insurer in favour of the assured, who, *ex hypothesi*, is not privy to it.

English view of re-insurance is indemnity.—In England, however, a policy of re-insurance on a life is essentially a contract of indemnity, even independently of any terms contained therein or indorsed thereon. Consequently nothing is payable to the re-insured company until proof be given by it that the sum originally insured has actually been paid (*m*).

Assured has no lien on re-insuring policy.—The person insured under the original policy cannot *claim any lien on [* 261] the re-insuring policy, and if the re-insured company becomes insolvent, the amount of the re-insuring policy, if paid, must go in with its other assets, and the original policy-holder can only get a dividend if those available for the purpose of his policy are deficient (*n*).

What undertaken by re-insurer.—A policy of re-insurance is an agreement by way of complete or partial indemnity to the insurer on the original policy (*o*). It presupposes an insurance effected, and the liability of the re-insurer is contingent on the liability of the insurer, as re-insurance is really a contract to shift liability, and its subject is the risk incurred by the re-insured (*p*).

It is not necessary for a re-insurer to take the whole risk, or the whole amount at risk. Thus a marine insurer against all perils of

(*i*) *Ibid.*

(*k*) *Cashau* v. *North-Western Insurance Co.*, 5 Bissell (C. Ct. T. U. S.) 476.

(*l*) 1 Emerigon, par Boulay-Paty, ch. 8, s. 14.

(*m*) Re *Athenæum Life*, Ex parte *Prince of Wales Assurance Co.*, 1 Johns. 633, 28 L. J. Ch. 335, 32 L. T. 195, 7 W. R. 137, 5 Jur. N. S. 383.

(*n*) *Carrington* v. *Commercial Fire*, 14 N. Y. Sup. Ct. (1 Bosw.) 152.

(*o*) *Joyce* v *Realm Co.*, L. R. 7 Q. B. 580, 586, per Lush, J. *Insurance Co.* v. *Insurance Co.*, 43 Am. Rep. 418. *Uzielli* v. *Boston Co.*, 15 Q B. D. 11.

(*p*) *Mutual Safety* v. *Hone*, 2 N. Y. (Comstock) 235.

[1] The A. company sold out its business to the B. company. In consideration thereof the B re-insured the A company's risks, and agree to pay, satisfy and discharge the losses. Held that this was more than a mere re-insurance, and that there was sufficient privity between a policy-holder and the B company to enable the former to maintain an action against the latter for a loss. *Johannes* v. *Phenix Ins. Co.*, 66 Wis. 50 S. C. 57 Amer. Rep. 249.

the sea can re-insure against fire only (*q*), and keep the rest of the risk on his own shoulders.

Proportion payable by re-insurer of one of several concurrent or successive policies.—When insurers grant two policies on the same property, the total amount of them being greater than the value of the property insured, and subsequently they re-insure on one of such policies only, the amount of the re-insurer's liability will depend on whether the insurers' policies are concurrent or successive (*r*). If the insurances are concurrent, the re-insurer will have to pay such proportion of the whole loss as is equal to the proportion which the re-insurer's policy bears to the whole sum insured. Thus if goods of the value of £1200 are insured to the amount of £1500 by two policies for £1000 and £500 respectively, and the latter policy [* 262] only is re-insured, the re-insurer will have to pay £400. *If, however, the insurances are successive, and the second policy is re-insured, the re-insurer will have to (so far as the sum re-insured suffices) the amount remaining of the loss after the first policy has been fully applied in satisfying it. *E. g.*, if goods of the value of £1200 are insured by two policies successively for £1000 and £500, and the latter policy only is re-insured, after the appropriation of the policy first applicable, viz., the £1000 policy, there will only remain £200 to be paid by the re-insurer in respect of the £500 policy.

Effect of condition "to pay as may be paid."—A re-insurance subject to all clauses and conditions in the original policy and to pay as may be paid thereon, attaches when the original policy attaches (*s*). In such a policy payment would seem at first sight a condition precedent to the right of suit thereon. But the true construction has been held in America to be, that it is meant to make the re-insurer's liability co-extensive with the liability, and not with the ability to pay, of the insurers, and that the re-insuring company is to have the benefit of any deduction by reason of other insurance or salvage that the original company would have (*t*).

Condition to pay pro rata.—A condition to pay *pro rata* at and in the same time and manner as the re-insured, cannot amount to a provision that if the re-insured is insolvent the re-insurer is only to pay the amount of the dividend on the particular insurance available from the assets of the re-insured. The condition only means that the re-insurer shall only pay at and in the same time and manner as the re-insured shall pay or be bound to pay, and that the re-insurer shall have all the advantages of the time and manner of payment in the first policy (*u*).

(*q*) *Imperial Marine* v. *Fire Insurance Corporation*, 4 C. P. D. 166, 48 L. J. C. P. 424, 40 L T. N. S. 166, 24 W. R. 680.

(*r*) *Union Marine Co.* v. *Martin*, 35 L. J. C. P. 181.

(*s*) *Joyce* v. *Realm Co.*, L. R. 7 Q. B. 580.

(*t*) Ex parte *Norwood*, 3 Bissell (C. Ct. U. S.) 504, 518.

(*u*) *Cashau* v. *North-Western Insurance Co.*, 5 Bissel (C. Ct. U. S.) 476. *Insurance Co.* v. *Insurance Co.*, 43 Am. Rep. 413.

The practice as to re-insurance seems to be to insert *a [* 263] clause in the policy of the re-insurance, that if the re-insured pays, his so doing shall be evidence sufficient to enable him to recover from his re-insurer (*x*). *Payment by insurer enables him to recover from re-insurer. French rule.*—And it would seem that French re-insurers inserted a clause allowing the original insurers to make *bonâ fide* a voluntary settlement and adjustment to be binding on the reinsurers (*y*).

Re-insurer' position in action by assured.—The re-insured will, it seems, be entitled to recover from the re-insurer his costs of defending any action brought by the assured under the original policy, if the re-insurer does not on notice appear and defend such suit (*z*), (²).

He may either wait until judgment or proceed at once against the re-insurer; and payment is not in America a condition precedent to his right of action (*a*).

But where the reinsured gave the re-insurer notice that he meant to pay, to which the re-insurer gave no response, it was held that the reinsurer could still raise all the defences open to the original insurer in action against him by the assured (*b*).

Proofs. Conditions.—The reinsured must of course in some way prove the character and extent of his loss (*c*), and must fulfill all the conditions of his re-insurance (*d*). But it has been held in Canada that he may to some extent waive the conditions contained in the original policy without defeating his recourse to his re-insurer (*e*).

Re-insured entitled to his reasonable and necessary costs.—The re-assured is entitled, besides the amount paid *by him for [* 264] the loss sustained by his assured, to be indemnified by his re-insurer for all costs and expenses reasonably and necessarily incurred by him to protect himself and entitle him to recover over

(*x*) So stated in *National Marine* v. *Protector Co.*, 5 Victoria L. R. 226, 229.

(*y*) Pothier, cited in *New York State Co.*, 1 Story Rep. (U. S.) 458.

(*z*) *Hastie* v. *De Peyster*, 3 Cains (N. Y.) 190. *Henry Rifle Barrel Co.* v. *Employers' Liability Co.* (1884), Q. B. D. *New York Central* v. *Protection Co.*, 20 Barb. (N. Y.) 468.

(*a*) *Hone* v. *Mutual Safety Co.*, 3 N. Y. Sup. Ct. (1 Sandford) 137.

(*b*) *National Marine* v. *Halfey*, 5 Victoria L. R. 226. *New York State* v. *Protector Insurance Co.*, 1 Story Rep. (U. S.) 458. See *M'Kenzie* v. *Whitworth*, 1 Ex. D. 36, 33 L. T. N. S. 655, 24 W. R. 287, 45 L. J. Ex. 238. *Joyce* v. *Realm Co*, L. R. 7 Q. B. 580.

(*c*) *Yonkers Fire Co.* v. *Hoffman Fire Co.*, 6 Robertson (Louis) 316.

(*d*) *New York Central* v. *National Protection*, 20 Barb. (N. Y.) 468.

(*e*) *Fire Association* v. *Canada Co.*, 2 Ontario 481.

² The A. company re-insured in the B. company. The A. company was sued, and the two companies agreed that the case should be fought, the A. company to control the defence. Without the consent of B., case was compromised. Held that B. was not liable to A. for any part of money paid by way of compromise. *Commercial Union Assurance Co.* v. *American Central Ins. Co.*, 68 Cal. 430.

against the re-insurer. But if in a clear case of loss he defends without reason, he will not get his costs (*f*).

Meaning of contribution clause in re-insurance policy.—If a contract of re-insurance contains a contribution clause, such clause will, in the absence of specific words, be taken to refer to a case of double re-insurance only, and a custom for reinsurers to pay only such proportion of the loss as the amount re-insured bears to the original policy will not be admitted. The custom suggested in the case below cited (*g*) was that, if partial re-insurance were effected, the insurer should only pay in full in case of a total loss, and in a partial loss should only pay proportionately in the way in which insurers pay under an average clause. If the contention in the particular case had succeeded, the re-insurer would have made what was a contribution clause work as an average clause, and have penalized the re-assured for not shifting the whole of his liability.

Condition that re-insured should retain other insurances.—A condition that the re-insured should retain a certain sum equal to the amount re-insured on other parts of the same property only means that they are to forbear from re-insuring so as to reduce their own risk below the stipulated amount, not that they must guarantee the continuance of existing insurances. So if the insured refuse to renew a policy of which the re-insured knows nothing till after the fire, the condition is not violated. To construe it otherwise would be to make the re-insured go on insuring against the will of the assured (*h*).

Where reinsurance part of original risk, that retained cannot drop without re-insurance dropping.—Where the re-insurance is on [* 265] part of the original risk, *the amount retained cannot drop without the re-insurance dropping too. So that the original insurers must retain the part stipulated if they wish to keep up the re-insurance.

But where the amount to be retained is a separate risk, though involved in the same peril, the word retain will not be construed as a guarantee that the assured will keep up all his existing policies (*i*).

Equal good faith required from re-insurer as from insured.—The re-insured must show as good faith as if he were seeking insurance, and not merely re-insurance (*k*), as the latter is not a contract of suretyship, but a form of the ordinary contract of insurance whereby a person who has guaranteed the safety of another's goods may have his own liability under the first guarantee covered by a second.

Concealment.—Consequently, if information possessed by the re-insured and material to the risk be not communicated to the re-in-

(*f*) *New York State Co.* v. *Protector Co*, 1 Story Rep. (U. S) 458, where Story, J., cites the jurists.

(*g*) *Mutual Safety Co.* v. *Hone*, 2 N. Y. (Comstock) 235. See *Union Marine* v. *Martin*, 35 L. J. C. P. 181.

(*h*) *Canada Insur. Co.* v. *Northern Insur. Co.*, 2 U. C. (App) 378.

(*i*) *Canada Insurance Co.* v. *Northern Insurance Co.*, 2 U. C. (App.) 378.

(*k*) *New York Bowery* v. *New York Fire*, 17 Wend. (N. Y.) 359.

surer, the policy of re-insurance will be void. *Re insured must state to re-insurer what he knows of assured's character.*—In some cases, therefore, a heavier obligation to disclose may fall upon the person seeking re-assurance than on his assured. Besides the information given by the latter, the former may *at the time* when granting the original policy, or subsequently, learn material facts as to the risk, and these he must disclose on seeking re-insurance. Thus, though the original assured would not be bound to give himself a bad character to his insurer's, such insurer's would, if seeking re-insurance, be bound to disclose what they knew of him (*l*), whether learnt before or after they granted the original policy.

Whether policy should be stated to be a re-insurance.—When re-insurance is made it is not necessary to disclose the fact that the policy is by way of re-insurance unless such fact is material (*m*). It seems to be *usual to declare that re-insur- [* 266] ance is sought if such be the fact, but there is no custom in marine insurance to that effect; for marine re-insurance was illegal, with certain exceptions, till 1864 (*n*).

Misrepresentation by re insured as to risk retained by him.—Misrepresentation by the re-insured will avoid the policy. Thus where one company re-insured part of its risk on a life, stating that another portion would be retained, but parted with the rest before the first re-insurance was completed, the contract was avoided (*o*). But representations as to the nature of the risk will not help a re-insurer who has formed his own judgment of the nature of the risk (*p*).

Notice to be given by re-insured of other insurances.—The re-insured must also give notice, if required, of other insurance on the property if he knows of it (*q*). In the case below cited the insurance was effected on an ordinary policy with re-insure substituted for insure.

Condition that reinsured may recover within specified time after loss.—It would seem that if the re-insurer's policy stipulates that the re-assured may recover thereon within a certain time after the loss, such time will run from the injury to the property, and not from payment under the original policy by the re-insured (*r*).

Condition as furnishing proof satisfied by transmitting proofs received from assured.—If the insurance policy contains a condition that the

(*l*) *Ibid. Sun Mutual* v. *Ocean Co*, 107 U. S. (17 Otto) 455.

(*m*) *M'Kenzie* v. *Whitworth*, 2 Ex. D 36, 45 L. J. Ex. 233, 33 L. T. 655, 24 W. R. 287

(*n*) 19 Geo II. c. 37, s. 4.

(*o*) *Foster* v. *Mentor Life*, 3 E. & B, 48, 23 L. J. Q B. 145, 22 L. T. 305. *Traill* v. *Baring*, 33 L. J Ch. 521, 4 Giff. 485, 10 L. T. N S. 215, 12 W. R. 678. *Louisiana Mutual Fire Co.* v. *New Orleans Co.*, 13 Louis Ann. 246. But see *Prudential Co.* v. *Etna Co*, 28 Blatch. (U. S. Circ. Ct.) 223.

(*p*) *Canada Ins. Co.* v. *Northern*, 2 U C (App.) 373.

(*q*) *New York Bowery* v. *New York Fire*, 17 Wend. (N. Y.) 359.

(*r*) *Provincial Co.* v. *Etna Co.*, 16 U. C. (Q. B.) 145.

parties assured shall furnish certain specific proofs as to their character, circumstances, and loss, such condition is complied with, in contemplation of law, if the party originally insured furnishes such proof to his immediate insurers, and they transmit the same to their re-insurers (*s*).

(*s*) *New York Bowery* v. *New York Fire*, 17 Wend. (N. Y.) 359. Ex parte *Norwood*, 3 Bissell (C. Ct. U. S.) 504.

CHAPTER XIV. [267]

OBLIGATION OF TENANTS TO INSURE.

Tenant for life or in tail need not insure.—A tenant for life or a tenant in tail, if the settlement contains no provision or obligation as to the repair or insurance of buildings on the settled estates, is not bound to insure or to reinstate in case of fire (*a*).

When entitled to policy-money.—And if such a person insures, paying the premiums out of his own pocket, he has been held entitled to the policy-moneys as against the remainderman (*b*). *Tenant in tail. Remainderman. Proceeds of policy.*—This was first decided in the case of *Seymour* v. *Vernon*, the facts of which were that some stables were burnt down, and it was thought needless and inexpedient to rebuild them. The Court had previously ordered the insurances to be kept up by a receiver for the benefit of all parties who, in the result of the decision of the Court in the administration suit, should be found entitled. And Kindersley, V. C., held that, inasmuch as the premiums had been paid out of the income of the infant tenant in tail, the policy-moneys were his. This case was followed and approved by Chitty, J., in *Warwicker* v. *Bretnall* (*c*), where a mill comprised within a strict settlement under a will had been insured on account of an infant tenant in tail out of the rents of the estate, and had been burnt down. The proceeds of the policy were insufficient for rebuilding, and it was not thought for the benefit of any one interested in the *settled [*268] estates that the mill should be rebuilt. The learned judge held that the policy-moneys belonged to the infant tenant in tail as part of his personal estate, and were not to be treated as part of the real property comprised in the settlement.

Warwicker v. *Bretnall discussed.*—With the greatest respect and deference for those learned judges, it seems that, if their decisions are correct, a limited owner may insure settled property for its full value, and in case of fire appropriate to his own use, not only so much of the insurance-money as is equivalent to the value of his own limited interest, but also the balance which represents the value of the interests in remainder. This appears to be opposed to the view expressed by Lord Justice Bowen (*d*), who says: "A person

(*a*) *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 487, 29 W. R. 547. 6 Anne, c. 58 (31 Ruff.); 14 Geo. III. c. 78, s. 83.

(*b*) *Seymour* v. *Vernon*, 21 L. J. Ch. 433, 16 Jur. 189.

(*c*) 28 Ch. D. 188; see also 31 W. R. 520.

(*d*) *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 376, 49 L. T. N. S. 29, 31 W. R. 557.

with a limited interest may insure either for himself, to cover his own interest only, or, if he so mean at the time, he may insure so as to cover not only his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he makes the policy. But he can only hold for so much as he intended to insure. There is the case of a mortgagee: if he has not the legal ownership, he is entitled to insure for the whole, but even if he is not entitled to the legal ownership, he is entitled to insure *prima facie* for all. If he intends to cover only his own mortgage, and is only insuring his interest, he can only retain the amount in which he has been indemnified. If he has intended to cover other persons besides himself, he can hold the surplus for those whom he has intended to cover. But if he intended to cover himself alone, and if his interest is limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest." If the decisions in *Seymour* v. [* 269] *Vernon* and *Warwicker* v. *Bretnall* are *good law, it is submitted that one class of limited owners—viz., the tenant in tail, must be excepted from what the Lord Justice says; and a tenant in tail, insuring all person interested, may receive and retain, not only so much of the insurance-money as represents the value of his own interest, but also the surplus which represents, and is really recovered in respect of, the interest of other parties. Even if the great authority of the learned Lord Justice did not seem to shake the decisions in *Seymour* v. *Vernon* and *Warwick* v. *Bretnall*, the considerations we have mentioned would make these decisions appear to us far from convincing or conclusive. There may be difficulty in estimating the proportion of the insurance-money payable to the tenant in tail; but why should the whole insurance-money be treated as realty and come under the settlement in lieu of the property destroyed? This would avoid all the difficulty of apportioning, and protect the rights of all parties.

Opinion of Mr. Davidson.—Mr. Davidson (*e*) says "that, in the absence of special contract or obligation, the tenant for life is not bound to repair or rebuild in case of fire, and by parity of reasoning is not bound to insure, yet it seems that if he is not insured he would be bound to lay out the money in rebuilding."

Tenants for years not bound to insure.—Tenants for years are not at Common Law bound to insure. Their legal duty, in the absence of special agreement, is merely to use the demised premises in a proper and tenantable manner, and includes no obligation to reinstate in case of fire (*f*). It is true that the statute of Gloucester seems to have been construed so as to make them liable in case of a fire [* 270] if accidental, *as for permissive waste if negligently caused, or for voluntary waste (*g*).

(*e*) Precedents Conv. vol. 8, pt. 1 (3rd ed.), p. 290 note (*e*).
(*f*) *Ibid.* vol. 5, pt. 1 (3rd ed.), 542 note (*a*). Sugden Handy Book 194 (8th ed.).
(*g*) 6 Ed. I. (A. D. 1278), see Davidson, *l. c.* *Hamilton* v. *Mendes*, 2 Burr. 1211 (1761), per. Lord Mansfield. *Turbervil* v. *Stamp*, 1 Salk. 13.

Tenants not liable for accidental fire.—But by 14 Geo. III. c. 78, s. 86 (*h*), in the absence of any contract or agreement with the landlord, they are exempted from all liability for accidental fires "occurring in their houses, chambers, stables, barns, or estates," "any law, usage, or custom to the contrary notwithstanding."

The statute is mainly local, but this and some other sections are general (*i*). The history of the section well illustrates the method of legislation in this country. The exemption was first granted as to houses and chambers only in 1708, by 6 Anne, c. 58 (6, 7, 8) (Ruffhead, c. 31), for a limited period, but revived and made perpetual in 1710 by 10 Anne, c. 24, s. 1 (*k*).

History of s. 83.—In 1772 it was repealed and re-enacted in the 12 Geo. III. c. 73, s. 46, a Metropolitan Building Act. In 1774 it was repealed and re-enacted in its present form (*l*), except the provision as to treble costs, which has been repealed by the Statute Law Revision Act, 1861, while the rest of Geo. III. c. 78, was repealed by 28 & 29 Vict. c. 90, s. 34 (a Metropolitan Fire Brigade Act), which s. 34 was in its turn repealed by the Statute Law Revision Act of 1785 (38 & 39 Vict. c. 66). Such repeal does not, however, revive the repealed portions of 14 Geo. III. c. 78 (*m*).

Tenant's liability for fire through his negligence.—Though now clearly not liable, except by contract, for accidental fire, a tenant for years is liable *ex delicto* at Common Law for damage done by a fire caused by *his own negligence, or that of his servants, to [* 271] the property of his neighbors or his landlord (*n*), and such liability is in no way affected, lessened, or varied by s. 86 of 14 Geo. III. c. 78.

May insure against fire through negligence.—In virtue of this liability for negligence he has an insurable interest in the premises occupied by him, and he may lawfully insure against his own negligence (*o*).

Protection of ordinary policy.—Indeed, an ordinary fire policy protects against own or servant's negligence (except perhaps the very grossest), or accidents, or arson by others, wherein assured has no complicity (*p*).

Tenant's liability as insurer, how created.—Landlord and tenant may

(*h*) This Act is wholly repealed, except this section and s. 83.

(*i*) *Filliter* v. *Phippard* (1847), 11 Q. B. 347, per Denman, C. J. *Richards* v. *Easto*, 15 M. & W. 244.

(*k*) C. 14 (Ruffhead).

(*l*) Platt on Covenants 188.

(*m*) See 13 & 14 Vict. c. 21, s. 5.

(*n*) See *Filliter* v. *Phippard*, 11 Q. B. 347. See *Vaughan* v. *Menlove*, 3 Bing. N. C. 468. *Turbervil* v. *Stamp*, 1 Salk. 13. These and other cases bearing on this subject are ably and exhaustively discussed in *Furlong* v. *Carroll*, 7 Ontario (App.) 145, and in *Hilliard* v. *Thurston*, 8 Ontario (App.) 514.

(*o*) *Dobson* v. *Sotheby*, 1 Moo & Mal. 90, 93, per Tenterden, C. J.

(*p*) *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561, 50 L. J. Q. B. 329, 45 L. T. N. S. 411, 29 W. R. 850.

contract that the latter shall be liable to the former in case the demised property shall be destroyed by fire (*q*).

Tenant under covenant to repair bound to reinstate.—A tenant who covenants or agrees to repair generally makes himself an insurer, and, if the demised premises are burnt down within his term, will be bound to reinstate, and is liable in damages if he does not do so. It does not matter whether the fire originated in or spread to the demised premises, nor how it was caused (*r*).

Insurance. Landlord and tenant.—A covenant by the tenant to pay any extra premiums exacted in consequence of work done or business carried on by him, seems to apply to the ordinary trade of the tenant, and not to special acts increasing the risk, such as setting up steam-engines, &c. (*s*).

[* 272] **Devisee for life when an insurer. Liability to rebuild of limited owner.*—A devisee for life, with a condition against committing waste, and for keeping the premises in good and tenantable repair, is under the same liability as a tenant, bound by an absolute repairing covenant, and the remainderman can make him rebuild. He cannot do so, however, unless such liability is imposed on him by the settlement under which he holds (*t*).

Tenant when an insurer. Trustee in bankruptcy.—The trustee in bankruptcy of a tenant is in the same position as the tenant save for his power of disclaiming a burdensome tenancy (*u*).

Insurable interest of tenant under covenant to repair.—The tenant who has covenanted "to repair and keep in repair" has an insurable interest in the premises sufficient to support a policy in his own name for the full value thereof. Such insurance is in effect a reinsurance of his own liability. *Position of insurers where landlord and tenant insure separately.*—Consequently if the landlord insured too, the insurers would not be entitled to demand contribution *inter se;* but the insurer of the landlord would be entitled either to subrogation to the landlord's rights on his covenant against the tenant, or to return of the policy money if the landlord had enforced these rights (*x*).

Effect of covenant to repair and to insure fixed sum.—The covenant to repair makes the tenant an insurer to the full value of the premises even if he also covenants to insure for a fixed sum. The latter covenant is a collateral security to the landlord, lessening but not

(*q*) 14 Geo. III. c. 78, s. 86.

(*r*) *Bullock* v. *Domitt* (1796), 6 T. R 650. *Pym* v. *Blackburn*, 3 Ves. Jun. 34. *Chesterfield* v *Bolton*, 2 Com. 627. *Digby* v. *Atkinson*, 4 Camp. 275. *Loadley* v. *Kemp*, 2 C. & P. 375.

(*s*) *Duke of Hamilton's Trustees* v. *Fleming*, 9 C S. C. (3rd series) 329, and also *Forbes* v. *Border Counties*, 11 C. S. C. (3rd series) 278. *Platt* v. *Kerry*, 7 Lr. Can. Jur. 80.

(*t*) Re *Skingley*, 3 M'N. & G. 221, per Truro, C. *Gregg* v. *Coates*, 23 Beav. 33, 2 Jur. N. S. 964, per Romilly, M. R, 4 W R. 735.

(*u*) 46 & 47 Vict. c. 52, s 55.

(*x*) *Darrell* v. *Tibbits*, 5 Q. B. D. 560, 50 L. J. Q. B. 33, 29 W. R. 66, 42 L. T. N. S. 797.

limiting the tenant's liability, as he remains absolutely liable to reinstate on his covenant to repair (*y*).

How liability as insurer is excluded.—It is consequently advisable to exclude from the covenant to repair the case of loss or damage by fire. *By so doing, the tenant removes from [* 273] himself all liability as an insurer, and limits his ability to the case of breach of his covenant (if any) to insure (*x*).

Covenant to insure runs with land.—A covenant to insure is not personal, but a covenant to do something in respect to the property demised, and is available to assignees (*a*) of the reversion against the tenant or his assignees (*b*).

Landlord not an insurer. Landlord not bound to rebuild.—The landlord is never in England an insurer. He is not bound at Common Law to rebuild in case of fire; in fact, he cannot enter upon the demised premises during the term except for breaches of the terms of the lease, and, if he went in to rebuild, would be a mere trespasser.

Tenant cannot compel landlord who insures to rebuild.—If the landlord insures himself against any risk not thrown on the tenant by the contract, and a fire occurs, the tenant has no equity to compel him to apply the proceeds of the insurance in repair of the damage (*c*). Such insurance is a precaution for the landlord's own benefit. He alone is entitled to benefit by it, and there is no privity between the tenant and the insurer.

Tenant cannot insist on landlord reinstating out of proceeds of his policy.—If the landlord has covenanted to repair the part burnt down, the tenant can only sue the landlord on that covenant, and must go on paying his rent in such a case even if the premises are burnt down (*d*). But though it is doubtful if he has the power to attach the policy-moneys when they have once reached the landlord's hands, and require them to be employed to repair *the damage in respect of which they were paid, he can, [* 274] as a person interested in the premises, give notice to the insurer (*e*) to employ them towards reinstating such damage, and in that way obtain what he seeks.

The law of Scotland.—"The law of Scotland is much more favourable to a tenant than the law of England. In England it appears to be the rule that if the premises let should be wholly destroyed by fire, the tenant must continue to pay rent for the term of his

(*y*) *Digby* v. *Atkinson*, 4 Camp. 278 (1815), per Ellenborough, C. J *Penniall* v. *Harborne*, 11 Q. B. 368, 17 L. J. Q. B. 94. 12 Jur. 159.

(*z*) *Weigall* v. *Waters*, 6 T. R. 448. See the covenants in *Darrell* v. *Tibbits*, cited *supra*, p. 272.

(*a*) *Bullock* v. *Domitt*, 6 T. R. 650 44 & 45 Vict. c. 41, s. 10.

(*b*) *Douglas* v *Murphy* (1858), 16 U. C. (Q. B.) 116. *Vernon* v. *Smith*, 5 B. & Ald 1. *Doe* v. *Gladwin*, 6 Q. B 953. Platt on Covenants 183, 186–189.

(*c*) *Leeds* v *Cheetham* (1827), per Leach, M. R, 1 Sim. 146, 150, 50 L J. O S. Ch. 105. *Lofft* v. *Denis* (1859), 28 L. J. Q. B. 168.

(*d*) *Leeds* v. *Cheetham*, 1 Sim. 146.

(*e*) 14 Geo. III. c. 78, s. 83.

lease. In Scotland a much more reasonable and equitable rule prevails. If the premises let have been so destroyed or severely damaged that they have become no longer fit for occupation for the purpose for which they were let, the tenant, being deprived by *damnum fatale* of the subject for which he agreed to pay rent, is free from the obligation to do so. This equitable rule, however, is subject to conditions, one of which is that the part destroyed must be essential" (*f*).

Covenant to insure is a usual covenant.—A covenant to insure is now a usual covenant in a lease, which a landlord is entitled to have inserted in pursuance of an agreement to take a lease with the usual covenants. And the lessee cannot demand to have it qualified by an exemption from the rent if the house is destroyed (*g*).

A covenant to insure does not make the tenant an insurer, but obliges him to find security of a certain kind to protect the landlord against the risk of fire. An insurance under it is of landlord's interest.

Form of covenant to insure.—The covenant to insure is not void for uncertainty where neither the words against fire nor the name of the office is mentioned (*h*). It is usual either to name [* 275] *particular insurers or to insert the words "some sufficient office" (*i. e.*, solvent insurers), or "some office to be approved by the lessor." But the most satisfactory method is for the lessor to insure and charge the premiums as an additional rent. This method, if with the addition of a covenant by him to spend the proceeds in reinstatement, leaves nothing to be desired.

Damages for breach of covenant to repair.—Damages for breach of a covenant to repair if a fire has happened are measured by the cost of rebuilding (*i*).

Breach of covenant to insure.—Damages for breach of a covenant to insure would be the amount of damage done by the fire not exceeding the specific amount, if any, for which the insurance was to be made (*k*).

Where the covenant is to insure sufficiently, and is broken, and a fire happens, the measure of damage is the value of the buildings, &c., that being the limit of a sufficient insurance. Damages must not be calculated so as to give new for old.

It is no answer to an action for breach that the landlord might pay the insurer and charge the premium as an additional rent, since the landlord is entitled to rely on the covenant and leave the tenant to keep the buildings insured at his peril: but if the tenant breaks his covenant, the landlord may pay the premium, and in

(*f*) *Allan* v. *Markland*, 20 Scr. L R. 268. *Duff* v. *Fleming*, 8 C. S. C. (3rd series) 769.

(*g*) *Sharp* v. *Milligan*, 23 Beav. 419.

(*h*) *Doe* v. *Shewin*, 3 Camp. 134.

(*i*) Mayne on Damages 241 (3rd ed.).

(*k*) *Douglas* v. *Murphy*, 16 U. C. (Q B.) 113. *Yates* v. *Dunster*, 11 Ex. 15.

such a case, if a loss occurs, the measure of damage for the breach will be merely the amount of premiums so paid (*l*).

Where no loss has occurred, the measure of damages is what it would cost the landlord to put himself into the position in which he would have been but for the *omission of the de- [* 276] fendant (*m*), *i. e.*, the premium paid to keep up an existing policy, or obtain a fresh one, or take out one if none has been effected (*n*).

Relief for breach of covenant to insure.—The Courts of Equity used to hold that breach of a covenant to insure was wilful, and one for which compensation could not be calculated (*o*), and therefore would not relieve from forfeiture so incurred. Hence it became needful to pass 22 & 23 Vict. c. 35, ss. 4, 9. No forfeiture, of course, was worked thereby, unless so stipulated; and without a forfeiture clause the remedy for the breach was merely an action for damages.

What breach works forfeiture.—The breach must be substantial to work a forfeiture. Thus an insurance in the lessor's name is not a substantial breach of a covenant to insure in name of lessor and lessee (*p*).

But to insure in joint names when the covenant is to insure in the lessor's would be a substantial breach (*q*), since the lessee could in such a case give a good receipt for the policy-moneys.

To leave the premises uninsured for ever so short a time is a breach (*r*).

Forfeiture not cured by ante-dating receipt.—Where a breach has been committed, the insurers cannot cure the forfeiture, if any, incurred thereby, by dating back the receipt (*s*) for the premium.

Breach of covenant to insure, when not enforceable. Estoppel of lessor.—If any conduct of the lessor induces the lessee to believe he is doing all that is necessary under the *covenant, [* 277] no forfeiture will result (*t*), since an estoppel is worked by the lessor's acts.

Waiver by lessor.—The lessor waives the forfeiture if he accept rent falling due after the breach; but the breach is a continuing breach, and the waiver operates only as to the portion of time prior to such waiver (*u*). 22 & 23 Vict. c. 35, the statute governing relief

(*l*) *Douglas* v. *Murphy*, 16 U. C. (Q. B.) 116.

(*m*) Mayne Damages 242 (3rd ed.). *Charles* v. *Altin*, 15 C. B. 46–65, 23 L. J. C. P. 197, 204.

(*n*) *Charlton* v. *Driver*, 2 B. & B. 345. *Quilter* v. *Mapleson*, 9 Q. B. D. 672, 52 L. J. Q. B. 44, 47 L. T. N. S. 561, 31 W. R. 75.

(*o*) *Rolfe* v. *Harris*, 2 Price 206 note. Platt Covenants 192.

(*p*) *Havens* v. *Middleton*, 10 Ha. 641, 17 Jur 271, 1 W. R 256. *Doe* v. *Peck*, 1 B. & Ad. 428.

(*q*) *Penniall* v. *Harborne*, 12 Jur 159, 12 Q. B. 368, 17 L. J. Q. B. 94.

(*r*) *Hey* v. *Wych*, 2 Gale & D 569, 12 L. J. Q. B. 83, 6 Jur 559. *Doe* v. *Ulph*, 13 Jur. 276, 18 L. J. Q B. 106.

(*s*) *Wilson* v. *Wilson*, 14 C. B 616, 18 Jur. 58', 23 L J C P. 137.

(*t*) *Doe* v. *Rowe*, 1 Ry. & M. 343. *Doe* v. *Sutton*, 9 C. & P. 706.

(*u*) *Doe* v. *Gladwin*, 6 Q. B 953. *Price* v. *Worwood*, 5 Jur. N. S. 472, 33 L. T. 149, 7 W. R. 506. *Bridges* v. *Longman*, 24 Beav. 27.

against breach of covenant to insure, has been repealed by 44 & 45 Vict. c. 41.

Relief under C. A. 1881.—Under the present law these cases are only important to show what amounts to a forfeiture, for the High Court has now power to relieve against such forfeiture when proved on such terms as seem just. And no stipulation or provision in a lease can in any way exclude this jurisdiction (*x*). The Court may relieve upon terms such as an injunction against a future breach, or *restitutio in integrum*, or damages estimated in manner already indicated.

It may be further observed that a landlord cannot now bring his action for a breach of covenant to insure, if he seeks a forfeiture in such action, unless he has served a notice on the lessee requiring him to remedy the breach and to pay a money compensation for the breach; and unless the lessee fails within a reasonable time thereafter to remedy the breach to the landlord's satisfaction, if it is capable of being remedied. Forfeiture therefore for breach of covenant to insure is now virtually impossible (*y*).

Repeal of 22 & 23 Vict. c. 35, ss. 4–9. Effects.—By the repeal by the Conveyancing Act, 1881, of 22 & 23 Vict. c. 35, ss. 4–9, [* 278] the protection (no longer *really needed) of an assignee of a lease, to whom the last receipt for rent has been produced, is withdrawn. On the other hand, the landlord no longer has the benefit of an informal insurance by the tenant, given by s. 7 of that Act.

Title to proceeds. Covenant to insure in landlord's name.—Where the tenant covenants to insure in the landlord's name, he is not entitled to receive the policy-moneys in case of a fire, or to employ them in reinstatement, or to reinstate and then demand the policy-moneys (*z*).

It may even be doubted whether if he allows the landlord to receive the money he can insist on its being employed in reinstatement (*a*). But he is clearly entitled to serve a notice to reinstate upon the insurer, and by that method to obtain the benefit of the policy (*b*). And the landlord has the same right respecting any insurance effected by the tenant on his own account (*c*).

Separate insurance by landlord and tenant, effects of.—Where the lessee is under covenant to insure, and the landlord insures also on his own account the same interest, the landlord would seem to be covered in both cases, and the insurers would be entitled to contribution *inter se*, where the insurance exceeded the whole value of the premises, or the fire was only partial. But in such a case the

(*x*) 44 & 45 Vict. c. 41, s. 14 (2). *Quilter* v. *Mapleson*. 9 Q. B. D. 672. 52 L. J. Q. B. 44, 47 L. T. N S. 561, 31 W. R. 75. Woodfall, 624, 625 (12th ed.).
(*y*) 44 & 45 Vict. c. 41, s. 14 (1).
(*z*) *Garden* v. *Ingram*. 24 L. J. Ch. 478, per Lord St. Leonards.
(*a*) See, however, *Reynard* v. *Arnold*, 10 Ch. App. 386, 23 W. R. 804
(*b*) Under s. 83 of 14 Geo. III. c. 78.
(*c*) *Reynard* v. *Arnold*, 10 Ch. App. 386, affirming S. C. 16 Eq. 218, 23 W. R. 804.

landlord will not be allowed to increase the liability of the tenant or to diminish the benefit of his policy, and will be obliged to bring into account what he has received on his policy (*c*). *Double insurance.*—For instance, if both insured for £500 on a house worth £700, in case of total loss £350 would be paid on each policy, and the landlord would be obliged to account to the tenant for £150, the *amount whereby the benefit of the latter's policy [* 279] effected under a covenent in his lease would be diminished. If damage were done, say to £100, each would receive £50. But the landlord would have to hand over the £50 which he received, or spend it in reinstatement.

Where a tenant being under a covenant to repair, &c., but not to insure, does insure, such policy is not an insurance of the landlord's interest, but of the tenant's liability, and in such a case no contribution would take place between the insurers if the landlord insured, and the tenant would not be harmed by such an insurance (*d*).

Option to purchase by tenant bound to insure.—When a tenant bound to insure has an option to purchase, he can insist on the proceeds of a policy effected by him being taken in satisfaction of part of the purchase-money (*e*).

A covenant to pay rent continues in force even after the destruction of the property in respect whereof it is payable (*f*). *Tenant's insurable interest in rent.*—The liability gives the tenant who incurs it an insurable interest in his rent which most offices are willing to cover. Where the covenant to pay rent is so qualified as to exclude this liability, the rent will, in case of a partial loss, be apportioned (*g*). But even a covenant excluding the liability to repair in case of casualties by fire will not remove the liability for rent (*h*). It is therefore prudent, ir all cases where liability to pay rent in case of fire is not clearly excluded, for the lessee to insure his rent.

Where a tenant is in no way responsible in case of *fire, [* 280] he may still be entitled to insure, to secure himself against loss of the benefit of his term by the happening of a fire, or loss of premises for which he is liable to pay rent for a term. But the value of his tenant's interest not being commensurate with the value of the fee-simple, he could not, on an insurance on his own interest,

(*c*) *Reynard* v. *Arnold*, 10 Ch. App. 386, affirming S. C. 16 Eq. 218, 23 W. R. 804.

(*d*) *Darrell* v. *Tibbits*, 5 Q. B. D. 560, 50 L. J. Q. B. 33, 29 W. R. 66, 42 L. T. N. S. 797.

(*e*) *Reynard* v. *Arnold*, 10 Ch. App. 386, 23 W. R. 804.

(*f*) *Holzapfel* v. *Baker*, 18 Ves. 115. *Baker* v. *Holzapfel*, 4 Taunt. 45 (1811). *Loffi* v. *Denis*, 28 L. J. Q. B. 171. *Packer* v. *Gibbins*, 1 Q. B. 421. *Izon* v. *Gorton*, 5 Bling. N. C. 501 (1839).

(*g*) *Taylor* v. *Caldwell*, 3 B. & S. 826, 32 L. J. Q. B. 164, 11 W. R. 726, 8 L. T. N. S. 356.

(*h*) *Belfour* v. *Weston*, 1 T. R. 310 (1786), and *Pender* v *Ainsley*, (1767), therein cited.

recover the fee-simple value (*i*) except by way of reinstatement. To hold otherwise would be to enable him, by adequate insurance, in case of fire to put himself into the freeholder's shoes.

Covenant to insure loss. Bankruptcy of covenantor.—Where a contract is made to insure the property of another, and that is burnt, and the contractor becomes bankrupt, the owner of the property may prove in the bankruptcy for the value of the property lost. It does not seem to matter whether the contract is to effect an insurance or one to be liable for damage by fire. But the claim of the owner must arise from damage suffered before the bankruptcy. It might at first seem a mere claim for unliquidated damages, but the Court in the case cited below held that the quantity and quality of the timber was settled before the bankruptcy, and that the value was regulated by the market price, and that a proof for its value at that price was admissible (*k*).

(*i*) *Castellain* v *Preston*, 11 Q. B. D. 380, per Bowen, L. J.; reported also 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*k*) Ex parte *Bateman*, 25 L. J. Bkcy. 19, 2 Jur. N. S. 365.

CHAPTER XV. [281]

MORTGAGE.

Mortgagor's insurable interest.—The mortgagor has an insurable interest in so much of the property mortgaged by him as is of an insurable nature. Whatever the number of mortgages he is equitable owner still, and his right to insure remains co-extensive with the value of the property (*a*). In case of loss the mortgagor has a perfect right to look to his indemnity from the insurers as a means of discharging the incumbrances in the place of the property itself. The incumbrances do not cease with the loss, and the whole loss is the mortgagor's, and he remains personally liable for the mortgage debt; for "every mortgage implies a loan, and every loan implies a debt, for which the property of the borrower is liable, though he have neither entered into a bond nor covenant for payment of it" (*b*).

Mortgagor's interest ceases on foreclosure.—The mortgagor's insurable interest in the mortgaged properties does not cease until foreclosure absolute, and the extinction of all equities in his favour (*c*); and in Canada until the mortgage debt has been paid, though foreclosure has taken place, on the ground that the mortgagor is still liable (*d*). In a recent American case the mortgagor was held to have an interest though the mortgagee had sold, as the sale was set aside.

Mortgagee's insurable interest.—A mortgagee as such has only a partial interest in any insurable property comprised in his security. His *mortgage interest is limited to the amount [* 282] of his mortgage debt by the terms of 14 Geo. III. c. 48 (*e*). Any fire policy effected in virtue of his mortgage interest is merely a collateral security for his debt, for "the contract of insurance contained in a marine or fire policy is a contract of indemnity and indemnity only, and the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified" (*f*). Such mortgage interest has in New Brunswick been decided to end on foreclosure absolute, and if a fire happen thereafter the mortgagee cannot re-

(*a*) *Glover* v. *Black*, 1 Wm Bl. 396, 3 Burr. 1394.
(*b*) Fisher Mortgages, vol. 2, p 679.
(*c*) *Thompson* v. *Grant*, 4 Madd. 438. See Angell Ins. p. 100, for American cases hereon *Stephens* v. *Illinois*, 43 Ill. 327.
(*d*) *Parsons* v. *Queen Insurance*, 29 U. C. (C. P.) 188, 211 This case came to the Privy Council on another point, 7 App. Cas. 96.
(*e*) See per Bowen, L. J., in *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q B. 366 at 376, 49 L. T. N. S 29, 31 W. R. 557.
(*f*) *Castellain* v. *Preston* 11 Q. B. D. 386, per Brett. L J.

cover on the policy effected by him as mortgagee (*g*); and he cannot, in case of a fire, recover more than the amount due at the time of the fire upon his security, because that is the measure of his loss, and the contract is only one of indemnity. The same is also the rule in Canada (*h*). Such a policy will not, according to some American authorities, cover further advances, unless it be specially so stipulated (*i*), so that, though the mortgage deed may contemplate further advances, only the unpaid balance of the amount due at the time when the policy was effected can be recovered. This would, however, seem to be at variance with English law; for "a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value subject to these two provisions. First of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself [* 283] by the way in which *he insures as not really to insure the whole value of the subject matter; and secondly, he must intend to insure the whole value at the time" (*k*). It therefore seems that if the policy is such as to cover the full value of the property insured, the mortgagee might recover to the full extent of his interest therein, whether such interest were created by original advance or further advance. The mortgagor has no interest in a mortgagee's policy effected with the mortgagee's own moneys, and not in pursuance of any agreement between them (*l*).

Mortgagor's interest in mortgagee's policy.—But by the operation of s. 83 of the old Metropolitan Building Act (*m*) (left unrepealed by the Metropolitan Building Act, 7 & 8 Vict. c. 84), the mortgagor may insist on the proceeds of a mortgagee's policy being applied towards reinstatement, and thus the policy might enure for the benefit of the estate (*n*). Mr. Davidson therefore thinks (*o*) that in such a case the mortgagee would have a right to recover the premiums independently of Lord Cranworth's or the Conveyancing Acts, probably as money paid to the mortgagor's use. This, however, has not been expressly decided.

(*g*) *Gaskin* v. *Phœnix*, 6 Allen (New Bruns.) 429. See also *Smith* v. *Columbian*, 17 Penn. 258. Seeing that he has only insured a special interest, and not the premises. But, *contrà*, see *Bailey* v *American Ins. Co.*, 5 McCrary (U S. Cirt. Ct.) 221.

(*h*) *Ogden* v. *Montreal*, 8 U. C. (C P.) 497, and see *Ebsworth* v. *Alliance Co.*, 43 L. J. C P. 394 n., a case of insurance of a partial interest or lien. And also *Johnson* v. *North British and Mercantile*, 1 Holmes (U. S. Circ. Ct.) 117; *Humphrey* v. *Hartford Fire*, 15 Blatch. (U. S. Circ. Ct. 504.

(*i*) *Smith* v. *Columbia*, 17 Penn. 258.

(*k*) *Castellain* v. *Preston*, 11 Q. B. D at 398, per Bowen, L. J. See note (*e*) *supra*.

(*l*) *Dobson* v. *Land*, 8 Hare 216, 14 Jur. 221, 19 L. J. Ch. 484. *King* v. *State Mutual*, 61 Mass. (7 Cush) 1.

(*m*) 13 Geo. III. c. 78.

(*n*) Ex parte *Goreley*, 4 De G. J. & S. 477, 13 W. R. 60, 34 L. J. Bkcy. 1, 11 L. T. N. S 319, 10 Jur. N. S. 1085.

(*o*) Precedents, vol. 2, pt. 2, p. 59 note (4th ed.).

Mortgagee's right to charge premiums.—In the absence of express stipulation, a mortgagee could not, independently of statute (*p*), charge in account the premiums paid by him upon an insurance of the property against fire (*q*), nor could he (even though the mortgagor had covenanted to insure against fire and neglected to do so), as against a subsequent incumbrancer, himself insure the mortgaged premises and add the sums so paid to his mortgage debt (*r*).

Chattels do not come within the scope of 14 Geo. III. c. [284] 78, s. 83, and reinstatement of them cannot be had. *Not obliged to reinstate fixtures.*—Consequently the mortgagee cannot be made to expend, in reinstating fixtures which were not attached to the freehold, money arising from an insurance thereon effected on his own account (*s*).

Mortgagee's right in mortgagor's policy.—If the mortgagor after the mortgage, and in the absence of any agreement by him to insure, does insure, the mortgagee could not, until the passing of the Conveyancing Act, 1881, claim to be paid out of the proceeds of such insurance (*t*). He could however, if the insurance-money had not been paid over, insist on its being applied in reinstatement (*u*). Now, however, by the Conveyancing and Law of Property Act, 1881 (*v*), a mortgagee, where the mortgage is made by deed, will have the power, to the like extent as if it had been expressed in terms by the mortgage deed "at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property; and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage-money, and with the same privity, and with interest at the same rate as the mortgage-money" (*x*).

Conveyancing Act, s. 23.—And by s. 23 of the same Act it is provided that—"(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed *two-third parts of the amount that [* 285] would be required in case of total destruction to restore the property insured.

"(2) An assurance shall not, under the power conferred by this Act, be effected by a mortgage in any of the following cases (namely):—

(*p*) 44 & 45 Vict. c. 4. s. 19 (2).
(*q*) *Bellamy* v *Brickenden*, *supra*, 2 J. & H. 137.
(*r*) *Brook* v. *Stone*, 34 L. J. Ch. 251, 12 L. T. N. S. 114, 13 W. R. 401 (1865)
(*s*) Ex parte *Goreley*, *ubi supra*.
(*t*) 11 Dav. 56. *Lees* v. *Whiteley*, 2 Eq. 143, 35 L. J. Ch. 412, 14 L. T. N. S. 472, 14 W. R 584. See Angell 114, s. 60.
(*u*) Ex parte *Goreley*, *ubi supra*.
(*v*) 44 & 45 Vict. c. 41.
(*x*) S. 19, clause 2.

"Where there is a declaration in the mortgage deed that no insurance is required.

"Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed.

"When the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

"(3) All money received on an insurance effected under the mortgage deed or under this Act, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

"(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under this mortgage."

Remarks on conveyancing Act, 1881.—The Act imposes no obligation to insure upon the mortgagor. It simply gives in certain cases to the mortgagee the power to effect and keep up a policy and pay the premiums, which will become a charge on the mortgaged property in addition to the mortgage-money, and the mortgagee can only charge the mortgagor the premium on an insurance not exceeding the amount agreed in the mortgage deed, or, if none be there agreed, two-thirds of the cost of reinstating, s. 23 (1), and he cannot charge the mortgagor with premiums in the face of contrary stipulations.

[* 286] **Act applies to mortgage by deed.*—The Act applies only to a mortgage by deed. Where an equitable mortgage exists with an agreement to execute a legal mortgage, the mortgagee can compel the execution of the latter; but it would seem, from the terms of the Act, could not exercise his statutory rights until the execution of such deed.

Two-thirds value insurable.—The limit of insurance for which the premium can be charged to the mortgagor, two-thirds of the cost of reinstatement, seems based on the usual limit of a mortgagee's advance.

Reinstatement under conveyancing Act, 1881.—The Act provides for a defect in s. 83 of 14 Geo. III. c. 78, by giving the mortgagee a power to insist on the proceeds of any insurance effected under the mortgage deed or the Act being employed in reinstating the premises, s. 23 (3), whether the same have or have not been paid over to the insurer. S. 83 only compels insurers to reinstate on the request of parties interested in the property insured, but does not oblige either of such parties, to whom the insurer may have paid over the insurance-money, to reinstate on the request of the other parties, interested. These statutory provisions do not affect the mortgagee's right to insure the whole amount of his mortgage debt in a case where he is insufficiently secured by policies to the amounts aforesaid. *Conveyancing Act limits mortagee's right to charge premiums,*

not his right to insure.—But he would be unable to charge the premiums on an amount in excess of what is specified in the statute, and would be liable to have the proceeds of his policy applied in reinstating the premises if the mortgagor so desired it (*y*).

Settled Land Act, 1882.—Where improvements are effected under the Settled Land Act, 1882 (*z*), and the tenant for life, or any successor having a limited interest, is obliged to insure the same under s. 28 (1), it would seem that, in case such improvements were damaged by fire, such tenant for life, or successor, could not pay the proceeds of an insurance *on such improvements [* 287] to a mortgage thereof without becoming liable to the remainderman, s. 28 (5).

Mortgagee of lessee insuring not entitled to policy-money.—And where a lessee insured in pursuance of his covenant in his lease, it would seem that the mortgagee of the leasehold interest could not claim the proceeds of the policy (*a*) as against the lessor.

Besides those cases in which either the insurance has been effected without any stipulation between the parties or to supplement a default by the mortgagor, questions arise as to the proceeds of policies effected under contract.

Right to proceeds of policy. Where covenant to repair broken. Covenant to insure.—Where lessor or lessee covenants to repair, the other of them would have no claim on a fire policy taken out for the purpose of protection against liability to repair in case of fire (*b*), but it would be different in case of a covenant to insure; and in *Garden* v. *Ingram* (*c*) a lessee under covenant to insure and apply the proceeds of the policy in reinstatement mortgaged his term, the mortgage deed containing no covenant as to insurance. A policy was on foot in accordance with the lease when a fire happened. The mortgagee assigned his interest with benefit of policy. The Lord Chancellor decided that the mortgagor could not claim a lien upon the policy for money expended by him voluntarily in reinstatement, as both insurance office and lessor could insist upon the policy-moneys being wholly expended on reinstatement. He decided further, that since the object of the insurance was reinstatement, the mortgagor could not claim the policy-moneys as against the mortgagee so as to defeat that object; and that being the original destination of the money, and the lessee being powerless to prevent reinstatement, it was immaterial to decide whether the benefit of the policy passed to the mortgagee's vendee.

The mortgagee had excercised his power of sale with [288] benefit of policy, so that the lessee's interest in the premises had ceased. This was held not to affect the validity of the pol-

(*y*) *Reynard* v. *Arnold*, 10 Ch. App. 386, 23 W. R. 804.
(*z*) 45 & 46 Vict. c. 38.
(*a*) 44 & 45 Vict. c. 41, s. 23 (4), but see *Garden* v. *Ingram*, 23 L. J. Ch. 274.
(*b*) *Brown* v. *Quilter*, 2 Eden 210, Amb. 619. *Leeds* v. *Cheetham*, 1 Sim. 146, 5 L. J. O. S. Ch. 105.
(*c*) 23 L. J. Ch. 478.

icy, inasmuch as the lessor's interest in the premises continued, but to deprive the lessee of all benefit of the indemnity promised by the policy, since he had not the property in respect of which it was to be given. In a very recent American case, where a mortgage contained a covenant by the mortgagor to insure, and the purchaser of the redemption obtained by his agent a policy payable in case of loss to the mortgagee, the latter was held entitled to the proceeds under the circumstances of the case (*d*).

This case enables the mortgagee, not to appropriate the proceeds of the lessee's policy, but to insist on its being used according to the covenant. In the particular case the mortgagor's vendee had become by conveyance the actual lessee. Now, however, the whole difficulty has been set at rest by s. 23 (4) of the Conveyancing Act, 1881 (*e*).

No right of reinstatement under bill of sale.—This section also covers *Lees* v. *Whiteley*, 2 Eq. 149, in which case a bill-of-sale holder, who had stipulated for insurance but not for appropriation of the policy-moneys to the debt, was held to have no equity to receive the proceeds of the policy as against the assignees of the grantor, who had become bankrupt. Kindersley, V. C., declined to import any term into the contract, or to imply it from the nature of the stipulation therein contained. A bill of sale on chattels does not, as would a mortgage on realty, give the holder any right to insist on reinstatement (*f*).

Mortgagee obliged to transfer instead of re-convey.—As a mortgagee may now be compelled to transfer his mortgage in lieu of [* 289] reconveyance (*g*), a question *may arise as to an insurance effected in his name, in pursuance of the statutory powers given by ss. 19, 23, of the Convenancing Act, 1881.

Since the premiums in respect of such insurance are to be a charge on the mortgaged property in addition to the mortgage-money, with the same priority and at the same interest (*h*), it would seem that the mortgagor could compel the mortgagee to do all things necessary to obtain the assent of the insurers to a transfer of the policy with the mortgage, and the result would seem to be the same if the mortgagee transferred of his own accord instead of at the request of the mortgagor, since the effect of the premiums being so charged on the property is virtually to make the policy a part of the security.

The position of the insurers is not altered by the Act. They could not, before or after it, be compelled to assent to a transfer.

Joint insurance by mortgagor and mortgagee.—Where mortgagor and mortgagee effect a joint insurance on the mortgaged estate, neither

(*d*) *Reid* v. *M'Crum*, 91 N. Y 412.
(*e*) See *Marriage Royal Exchange Assurance*, 18 L. J. Ch. 216.
(*f*) Ex parte *Goreley*, 4 De G. J. & S. 477, 34 L. J. Bkcy. 11 L. T. N. S 319, 13 W. R. 60, 10 Jur. N. S. 1085.
(*g*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 15.
(*h*) S. 19.

can apply the proceeds of the insurance, which is a joint security, irrespectively of the claims of the other. So the assignees in bankruptcy of a mortgagor who had received the proceeds of a joint policy were ordered, at the suit of the mortgagee, to pay them into the Court of Chancery, although they had already been paid into the mortgagor's account in bankrupcy (*i*).

Receipt of one sufficient.—Nevertheless, in the case of a joint insurance the receipt of the one who had the policy would be a sufficient discharge to the insurance company (*k*); and Lord Denman said (*l*): "The covenant to insure in the names of three persons is not complied with by insuring in the names of those three and another; that other party may receive the money from the insurance company in case *of fire, or he may release [* 290] an action brought to recover the amount."

Power to charge premiums against the mortgagor.—Premiums paid by the mortgagee to insure the mortgaged property against fire will not be allowed to the mortgagee in his account, and cannot be charged on the mortgaged property except by express contract in that behalf, or in virtue of statutory powers (*m*). This is so even where the mortgagor has covenanted to insure and the mortgagee has paid the premium on his default. In such a case the mortgagee cannot add the premiums so paid to his mortgage debt as against a subsequent incumbrancer (*n*).

Principle of decision.—The principle upon which the decisions cited go is that if the mortgagee insures for his own benefit, and is not liable to account for the proceeds of his policy in case of a loss, he cannot debit the mortgagor with the premiums. *When mortgagee may charge premiums.*—Consequently, where the insurance is authorized by the mortgagor, or in the mortgage deed, and is for the mortgagor's benefit, the mortgagee will be entitled to his premiums, in account or otherwise, even where the policy effected by him does not actually conform to the terms of the deed (*o*).

These rules of law apply only to such mortgages, if any, as were effected before the 28th August 1860, when Lord Cranworth's Act came into operation (*p*).

All mortgage deeds executed between that date and December 31, 1882, both inclusive, come within the provision of that Act. This Act is now repealed by Conveyancing Act, 1881, s. 71 (1), but

(*i*) *Rogers* v. *Grazebrooke*, 12 Sim. 557.

(*k*) 2 Rol. Abr. 410 (D), pt. 1, 5.

(*l*) *Penniall* v. *Harborne*, 12 Jur. 161, 17 L. J. Q. B. 94, 11 Q. B. 368.

(*m*) *Dobson* v. *Land*, 8 Ha. 216, 19 L. J Ch. 484, 14 Jur. pt. 2, 221. *Bellamy* v. *Brickenden*, 2 J. & H. 137, 32 Beav. 434. 44 & 45 Vict. c. 41, s. 19 (ii.).

(*n*) *Brooke* v. *Stone*, 34 L. J. Ch. 250, 12 L T. N S. 114, 13 W. R. 401. But see *Scholefield* v. *Lockwood* 33 L. J. Ch. 106, 9 Jur. N. S. 738, 1258, 11 W. R. 555, where Lord Romilly allowed them, as mortgagor was under covenant to insure, 8 L. T. N. S. 409.

(*o*) *Dobson* v. *Land*, 4 De G. & S. 575, *supra*.

(*p*) 23 & 24 Vict. c. 145, ss. 11. 32, 34.

by s. 71 (2) its benefits are saved for instruments executed [* 291] before the *commencement of the Conveyancing Act, 1881, the provisions whereof as to mortgages only apply to deeds executed after December 31, 1882 (*q*).

Effect of Cranworth's Act, and Conveyancing Act, 1881.—By Lord Cranworth's Act (s. 11) the mortgagee is, as an incident of his mortgage, given the power to insure and keep insured against fire the whole or any part of the property mortgaged, whether affixed to the freehold or not, which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured, at the same rate of interest. But such power will only take effect or be exercisable in the absence of an express declaration to the contrary in the mortgage deed, and may be made to take effect subject to any variations and limitations contained therein (s. 32).

The provision of the Act seem to apply only to deeds executed after its passing (s. 43) (*r*).

The provisions of the Conveyancing Act, 1881, as to insurances upon mortgaged property are similar to those of Lord Cranworth's Act, but more comprehensive, especially in its provisions as to the application of the insurance money (*s*).

Subrogation of insurer to mortgagee's rights against insured.—Though where a mortgagee insures his debt on his own account, the mortgagor has no claim on the proceeds of such a policy, the insurer, it would seem, is entitled to be put into the mortgagee's place as to the mortgage debt if he pays the loss; and conversely, if the mortgagee is paid by the mortgagor after loss, but before his action against the insurer is concluded, he cannot recover on the policy. And if after payment on the policy he recovers, whether by suit or otherwise, the mortgage-money, he must refund to the in- [* 292] surer so *much of his total receipts from both mortgagor and insurer as is in excess of his actual loss by the fire. This all follows from the principle that insurance is a contract of full indemnity and no more (*t*).

Separate policies by mortgagor and mortgagee.—The existence of an insurance by the mortgagee on his own account would in no way affect the validity of an insurance by the mortgagor on this interest. In case of a loss, the policies being on different interests, the in-

(*q*) Williams, Real Property (18th ed.), 454 note.

(*r*) See, however, s. 24. Williams, Real Property, 454, considers the Act to apply only to deeds executed after its commencement, and so does Bunyan, Fire Ins. (1st ed.) 195, in spite of this section.

(*s*) S. 19 (2).

(*t*) Per Gibson, J., *Smith* v. *Columbia*, 17 Penn. at 261, and see *Castellain* v *Preston*, 31 W. R. 557, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29 *King* v. *State Mutual*, 61 Mass. (7 Cush.) 1, holds the insurer's right to be only equitable, if any, and only to arise when mortgage recovers. But this decision goes on narrower grounds than the others cited. A claim for assignment of securities was made in *Scotish Amicable Assurance* v. *Northern*, 21 Sc. L. R. 189, 11 C. S. C. (4th series) 287.

surers would not be entitled to contribution *inter se* (*u*), and the mortgager's insurer would have to pay in full to his assured. But if the mortgagor's insurer reinstated, the mortgagee's claim on his policy would be gone.

When mortgage debt to be paid out of mortgagor's policy. Subrogation of mortgagee's insurer as against mortgagor's insurance.—It may be that as under s. 23 (4) of the Conveyancing Act, 1881, the mortgagee is entitled to make the mortgagor, out of the proceeds of any insurance effected by him for which no other destination is provided by law or special contract, pay off the mortgage debt, so also the mortgagee's insurer would, under *Castellain* v. *Preston*, be enabled to press his claim to the mortgagor's policy, even if not effected in pursuance of a covenant to do so.

Mortgagor not entitled to mortgagee's insurance.—Where a mortgagee insures his own mortgage interest in the property comprised in his security, intending only to cover himself, the mortgagor is not entitled to benefit by such a policy.

Mortgagee's insurer subrogated to rights under mortgage deed.—The mortgagee's insurer would, if the property were destroyed, be bound to pay the money to the mortgagee, and would probably, by analago to the principle of underwriters being entitled to the vendee's lien, as *suggestive by Bowen, L. J., in *Castellain* [* 293] v. *Preston* (*x*), be entitled to the benefit of the mortgagee's security; or, if the view of that learned judged go too far, would certainly be entitled, if the mortgagee subsequently enforced his mortgage security, to repayment of the surplus realized thereby in excess of the mortgage debt.

Effect of insurance by mortgagor and mortgagee in separate offices.—Where the mortgagor has insured in pursuance of his covenant to insure, and the mortgagee has also insured the same estate in a different office, the two offices would apportion the amount of the insurance, and thus the mortgagor would sustain a loss equal to the difference between the amount for which he insured and the apportioned sum received by him. By the principle, however, laid down in *Reynard* v. *Arnold* (*y*), the mortgagor would be entitled to recover from the mortgagee such difference. Conversely, if the mortgagor, by effecting insurance in addition to the amount covenanted for in the mortgage deed, and by the effect of contribution between the two insurers the amount receivable on the mortgagee's policy is made less than the actual damage done, the mortgagor must account to the mortgagee *pro tanto* as to the benefit gained by him on the other policy (*z*).

(*u*) *North British, &c., Co.* v. *London, Liverpool, and Globe*, 5 Ch. D. 69, 36 L. T. N. S. 629, 46 L. J. Ch. 587.

(*x*) 11 Q. B. D. at 405, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557; see also per Thesiger, L. J., in *Darrell* v. *Tibbits*, 5 Q. B. D. 568, 50 L. J. Q. B. 33, 42 L. T. N. S. 797, 29 W. R. 66.

(*y*) 10 Ch. App 386, 23 W. R. 804

(*z*) *Ames* v. *Richardson*, 29 Minnesota 29.

Receiver appointed by mortgagee may effect insurance.—The mortgagee has, as an incident of his power to appoint a receiver of the rents and profits of mortgaged property, a right to direct such receiver to effect insurance on the said property, and the premiums on such insurances are payable out of the income of the mortgaged property after the rents, taxes, and outgoings, and the interest on mortgages prior to that under which he is receiver (*a*).

When mortgagee bound to account to mortgagor for policy-
[* 294] *money.*—A mortgagee who receives the proceeds of an *insurance effected by himself not under the provisions of the Act or the mortgage deed is not liable to account to the mortgagor for such proceeds; nor can the mortgagor plead receipt of such proceeds as satisfaction of the mortgage debt to an action upon the mortgagor's covenant in the deed, for the latter is in the position of a tenant under a repairing covenant, whose house is destroyed, and who has not insured, though the landlord has done so (*b*).

Mortgagee may recover on his policy and also from mortgagor, but only to the amount of the mortgage debt.—But though the mortgagee by recovery from the insurer on his own policy is not disentitled to an action against the mortgagor, any sum recovered by him from the latter, which, together with the sum received from the insurer, exceeds the whole amount of the mortgage debt, will belong to the insurer, and the mortgagee would be trustee for the insurer of such surplus (*c*). *Doctrine of subrogation generally.*—"The doctrine is well established, that where something is insured against loss, either in a marine or in a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against" (*d*). The effect of this principle is that the insurers on payment would step into the shoes of the mortgagee and have all his rights against the residue of the mortgaged property and the mortgagor.

It seems, by parity of reasoning, that subrogation would arise where an action for negligence lay for negligent destruction or damage of the mortgaged premises (*e*).

[* 295] *In practice there is little doubt that the mortgagee would give the mortgagor the benefit of the policy on his consenting to include the premiums as part of the mortgage debt, but this consent would not bind the insurers.

No case has yet occurred in this country of an insurer proceed-

(*a*) 1881, s. 24.
(*b*) *Darrell* v. *Tibbits*, 5 Q. B. D. 562, 50 L. J. Q. B. 33, 42 L. T. N. S. 797, 29 W. R. 66.
(*c*) Per Jessel, M. R., *Commercial Union* v. *Lister*, 43 L. J. Ch. 602, 9 Ch. App. 483.
(*d*) Per Brett, L. J., in *Darrell* v. *Tibbits*, 5 Q. B. D. at 563.
(*e*) *Commercial Union* v. *Lister*, 9 Ch. App. 483, 43 L. J. Ch. 601.

ing against a mortgagor under the above circumstances in exercise of his subrogated rights. And it is unlikely that the insurers would make any claim against the mortgagor, since such claim would not conduce to their prosperity in business, though they might on the principle of *Castellain* v. *Preston* (*f*), make the mortgagee hand over any amount received by him in excess of his mortgage debt, or prevent his recovering such amount by assigning to the mortgagor their rights of subrogation to the mortgagee's claims under the mortgage deed. It would seem that, if such an assignment were given, it might be made available as defence to an action on the covenant by the mortgagee (*g*).

Contribution where separate insurances by mortgagor and mortgagee.—Where both mortgagee and mortgagor have insured separately, as may still happen in equitable mortgages, the insurers usually insist on contribution. This is not strictly correct, as the interests insured are different; but it is clear that, if both are allowed to recover, one must profit by the fire if the sum of the policies exceed the value of the property. Strictly speaking, the proper course would be for the mortgagee's insurer to pay in full, and proceed against the mortgagor for the amount paid. The mortgagor would be entitled to retain any balance on the proceeds of his own policy as the value of his equity of redemption. But the offices prefer to treat each other as co-insurers in such a case. And the Conveyancing Act has made, as between mortgagor and mortgagee, insurance practically run *with the land, as has been [* 296] held by James, L. J., should be the case (*g*).

Mortgagee of leaseholds could not be heard against forfeiture before Conveyancing Act, 1881; it is otherwise since the Act.—The mortgagee of a leasehold interest who is not in possession could not before the Conveyancing Act, 1881, be heard on an application for relief against forfeiture under 23 & 24 Vict. c. 126, s. 2, on the breach of the lessee's covenant to insure (*h*) in the lessor's action against the lessee, and could not be made a party to the action of ejectment under Ord. xvi. r. 13, J. A. 1875; and it was said by Lush, J., that if the mortgagee had any equity he must pursue it as a suitor. But in s. 14 of the Conveyancing Act, 1881, the word "lessee" includes his assignee, and therefore a mortgagee by assignment of leaseholds could in the landlord's action or one brought by himself apply for relief against such a forfeiture, and the Judicature Act and Rules enable him to come for relief even after judgment (*i*).

In mortgage deeds to be made under the present law, a covenant to insure against fire is scarcely needed (*k*).

(*f*) Reported 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.
(*g*) *The Potomac*, 105 U. S. (15 Otto) 630.
(*g*) *Raymer* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547.
(*h*) *Mills* v. *Griffiths*, 45 L. J. Q. B. 771.
(*i*) *Jacques* v. *Harrison*, 12 Q. B. D. 165.
(*k*) Davidson Prec. Conv. 195.

[* 297] *CHAPTER XIII.

FIRE POLICIES AND ASSIGNMENT.

Rights of assignor and assignee to policy after assignment of property.—If the assignment of property insured against fire be total, the assignor cannot recover on the policy for himself, as his interest in the property will have ceased.

If the assignment be partial, he can recover for his own benefit only to the extent of his remaining interest.

The assignee of property insured against fire can recover nothing under a policy effected by the assignor unless—

(1) It was part of the contract between the assignor and assignee that the latter should have the benefit of the policy as between assignor and himself.

(2) The office consented to hold the assignee assured either by the terms of the policy, or on notice of the intention to assign before transfer of the property.

(3) If the policy expresses that the consent of the office will be given in any particular form, that form must be strictly complied with. Nor can a vendor recover on his policy for the benefit of the purchaser after he has been paid the purchase-money in full, though he has not conveyed, and even if it be part of the contract of sale that the vendor shall keep alive the policies for the benefit of the purchaser, and assign them to the purchaser (*a*). Under [* 298] such a contract, *however, the vendor would be bound to get the insurer's consent, if he could, to the transfer, or to effect a new policy for the purchaser's benefit, and would be liable for neglect to do so.

Assignability of policies.—Policies of insurance are choses in action, giving as they do the right to proceed in a court of law to recover the money thereby contracted to be paid (*c*). "A policy certainly must be transferred, for though a chose in action cannot in law be assigned, yet in equity it may; therefore we will permit the action to be brought by the trustees" (*d*).

Insurer's consent necessary to assignment of policy.—The rule in equity that choses in action are assignable does not, however, apply to every form of policy. For it seems universally to have been

(*a*) *New South Wales Bank* v. *Commercial Union* (*No.* 2), 3 N. S. W. Law 60, wherein the English and American law is fully and ably discussed.

(*c*) Ex parte *Ibbetson*, 8 Ch. D. 519, 39 L. T. N. S. 1, 26 W. R. 843.

(*d*) Words used in *Delaney* v. *Stoddart*, 1 T. R. 26 (1785), per Akhurst, J. The statutes dealing with assignment of life and marine policies do not give the right to assign, but prescribe the mode of assignment.

held that fire policies are personal contracts (*e*), and that the consent of the insurers is necessary to the assignment thereof; while marine policies have always been assignable with their subject-matter, and life policies have been treated as reversionary interests, and allowed to be assigned, charged, or otherwise dealt with (*f*). The Judicature Act, 1873, makes no change in this respect, merely providing a mode by which the assign, if any, of a chose in action, may perfect his legal title to sue thereon, instead of trusting to his equitable interest under the legal title of his assignor (*g*).

Assignment of fire policies.—Insurers seem from the earliest times of fire insurance to have been careful to prevent fire policies from *being assigned without license. But for special re- [* 299] strictions on assignment in the policy itself (upon which the old cases of *Lynch* v. *Dalzell* (*h*) and *Sadlers Co.* v. *Badcock* (*i*) seem to go), there is no apparent reason why a fire policy should not be assignable with the subject-matter thereof as readily as a marine policy has always been, except that in land-risks, where the subject-matter is usually within the control of the assured, his personal character is of more importance than in sea-risks, where the goods, &c., from the moment that they go to sea, are out of his reach.

If vendor of chattels sell before the loss he cannot recover on policy.—The contract of fire insurance being a contract of indemnity, no one can recover in respect of the loss who is not interested in the subject-matter of the insurance at the time such loss occurs. *Vendee has no interest in policy unless by assignment.*—Therefore, if a person assigns away his interest in a ship or goods after effecting a policy of insurance upon them, and before the loss, he cannot recover the insurance-money from the insurers for his own benefit (*k*); "and on the sale of a thing insured, no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly" (*l*).

If, however, the policy was actually assigned or handed over to the vendee, or if there was a stipulation that the vendor should assign it to or keep it alive for the benefit of the vendee, the latter would be entitled to the policy-money on the loss occurring. The assignment, however, by the vendor, or its equivalent, must be

(*e*) *Lynch* v. *Dalzell*, 4 Bro. P. C. 431 (1729). *Sadlers Co.* v. *Badcock*, 2 Atk. 554, 1 Wils. 10. *Rayner* v. *Preston*, 18 Ch. D. 1, per Brett, L. J., 50 L. J. Ch. 472, 44 L. T. N. S. 787.

(*f*) *Pellas* v. *Neptune Co.*, 5 C. P. D. 34, 29 W. R. 547, 49 L. J. C. P. 153, 42 L. T. N. S. 35, 28 W. R. 405. See the difference between the assignability of fire and life policies stated in *Mutual Life Insurance Co.* v. *Allen*, 52 Am. Rep. 247, 138 Mass. 24.

(*g*) S. 25, sub-s. 6.

(*h*) 4 Bro. P. C. 431.

(*i*) 2 Atk. 554. See *Miall* v. *Western Insurance Co.*, 19 U. C. (C. P.) 270.

(*k*) *Powles* v. *Innes*, 11 M. & W. 10, 12, L. J. Ex. 163.

(*l*) *North of England Oilcake Co.* v. *Archangle, &c., Co.*, L. R. 10 Q. B. 255, per Quain, J., 44 L. J. Q. B. 121, 24 W. R. 162, 32 L. T. N. S. 561.

made or take place before the property has actually passed from the vendor to the vendee; for an assignment made after the [* 300] interest of the vendor in the subject-matter of the *insurance has ceased, cannot operate to give the assignee an interest in the policy (*m*).

In the two old leading cases on this subject (*n*), the original assured had parted with his interest in the property insured before the happening of the fire, and had subsequently to the fire attempted to give his assigns the benefit of his policy.

Assured's consent necessary to transfer of policy.—The policy, if assigned at all before the loss, must be assigned with the property which it covers. Such assignment will operate only by consent of the insurers, and the insurers will not assent without proof of the assent of the original assured. This is required for two reasons—

(1) That it is common for the companies to permit transfer of a policy to other goods, if the goods first covered are assigned during its currency, and that, if they permitted the first policy to enure to the benefit of the assignee, they would make themselves liable to a double claim (*o*).

(2) That they may have clear proof that the assignment is in the bargain as to the goods, and that the assignee is not simply helping himself to the policy as a mere accessory, and without any assent thereto on the part of the assignor.

Fire policies, when assignable. Insurer's acquiescence in assignment is optional.—Although in certain circumstances Equity will recognize the assignment of a fire policy (*p*), such right is subject to the special stipulation of the particular contract, and no right to assign before loss so as to bind the insurer can arise under a policy against fire in the ordinary form by which the insurers bind themselves to pay the insured, his executors and administrators, and con- [* 301] tains a condition that no assignment will be valid *unless accepted (such acceptance being testified in a prescribed way) by the insurer. The insurer cannot be made to accept any assign (*q*). It is pure matter of favour for him to continue the insurance, and the contract is a new contract.

Does fire policy run with land?—The view that a fire policy runs with the land has not yet found favour with the Courts. But it is fully and very forcibly put forward by James, L. J., in *Rayner* v. *Preston* (*r*). In a dissenting judgment, his lordship considered that

(*m*) *North of England Oilcake Co.* v. *Archangel, &c., Co., ubi sup.*

(*n*) *Sadlers Co.* v. *Badcock*, 2 Atk. 544, 1 Wils. 10. *Lynch* v. *Dalzell*, 4 Bro. P. C 431.

(*o*) *Miall* v. *Western Insurance Co.*, 19 U. C. (C. P.) 270

(*p*) *Rayner* v. *Preston*, 18 Ch. D., per Brett, L. J., 10, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547.

(*q*) *N. S. Wales Bank* v. *North Brit. Mercantile Co.*, 3 N. S. W. Law 60. In America he may not refuse his assent without reasonable grounds.

(*r*) 18 Ch. D. 12.

a contract of fire insurance should be held to run with the land, and enure to the benefit of the person from time to time interested therein. It runs with the interest insured provided that the owner of the interest is acceptable to the insurers.

Loss of fire falls on purchaser where vendor lets insurance expire.—If after the contract of purchase, and before the conveyance, the property is destroyed by fire, the loss will fall upon the purchaser, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the purchaser. If, however, the vendor, has before the fire broken his contract, *e. g.*, to repair or alter the property, the subsequent loss will not fall on the purchaser (*s*).

The first business of a purchaser is therefore either to insure as from the date of his contract or to take an agreement to insure from the vendor.

As the law now stands, the benefit of a fire policy does not pass to a purchaser without an express contract to that effect (*t*). It is not an accessory of the original property passing by an assignment, but a right of recourse to the insurer on loss or damage to the *property insured; and while the vendor cannot profit [* 302] by the policy after a conveyance of the property, or recover upon it so as to get paid twice over (*u*), in the opinion of Lord Justices Brett and Cotton (*v*), no equity subsists between the vendor and purchaser, in the absence of contract between them, entitling the purchaser to the benefit of a fire policy effected by the vendor; and it may be added, that if the purchaser of the property had the benefit, he would get for nothing a protection, which had been purchased by the vendor for valuable consideration, in the shape of premium.

French law.—The French law is otherwise, and holds the policy to be accessory and to pass with the property (*x*).

Rayner v. *Preston.*—The law on this point is by no means satisfactory. In *Rayner* v. *Preston* the vendor of property, burnt before completion, recovered the insurance-money and declined to give the benefit of the policy. But if the purchaser had applied to the insurance office under s. 83 of the old Metropolitan Building Act (14 Geo. III. c. 78), he could, as a person interested in the property, have com-

(*s*) Sugden V. & P. (14th ed.) 291.

(*t*) *Poole* v. *Adams*, 12 W. R. 683, 10 L. T. N. S. 287. *North of England Pure Oilcake Co.* v. *Archangel Maritime*, L. R. 10 Q. B. 249, 44 L. J. Q. B. 121, 32 L. T. N. S. 561, 24 W. R 162. *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547.

(*u*) *Castellain* v. *Preston*, 11 Q. B D. 380, 49 L. T. N. S. 29, 52 L. J. Q. B. 366, 31 W. R. 557. See also *Collingridge* v. *Royal Exchange*, 3 Q. B. D. 173, 47 L. J. Q. B. 32, 37 L. T. N. S. 525, 26 W. R. 112.

(*v*) *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547.

(*x*) See *Stanton* v. *Home Ins. Co.*, 24 Lr. Can. Jur. 38. Canada Civil Code, arts, 2488, 2576.

pelled reinstatement. (It was upon this ground that James, L. J., considered that a contract of fire insurance should be held to run with the land and come to the benefit of the firm from time to time interested therein). *Rights of vendor and purchaser on sale of property insured.*—So in fact the vendor has a good title against the insurer to recover under the policy; and by *Paine* v. *Meller* (*y*) he has a good title against the purchaser to recover the contract price in respect of the thing destroyed; but if he receives the purchase-money he will have sustained no loss by the fire, and may be com-
[* 303] pelled to refund to the insurers the amount *which they paid him as an indemnity against his loss (*z*).

Opinion of Cotton, L. J.,—In *Rayner* v. *Preston*, above cited, Cotton, L. J., said: "The contract [of sale] passes all things belonging to the vendor appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts, and such at least independently of the Act 14 Geo. III. c. 78, the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, or affecting their right to enforce the contract for sale; for it is conceded that if there were no insurance, and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the buildings, but a contract in that event to pay the vendors a sum of money which, if received by them, they may apply in any way they think fit. It is a contract not to repair the damage to the building, but to pay a sum not exceeding the sum insured, or the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass without apt words under a contract for sale of the thing insured. An unpaid vendor is a trustee in a qualified sense only, and is so not only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part."

Mortgage of insured property.—Where the property insured against fire is conveyed by way of charge only, the interest of the insured is not defeated (*a*). It is provided by the Conveyancing
[* 304] Act *of 1881 (*b*) that the holder of such charge can, in addition to his other rights, require the proceeds of any insurance effected on the property by the mortgagor, where no express agreement has been made to the contrary, to be applied in or towards the discharge of the money due under the mortgage.

(*y*) 6 Ves. 849. And see *Gillespie* v. *Miller*, 1 C. S. C. (4th series) 423.

(*z*) *Castellain* v. *Preston*, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557.

(*a*) *Burton* v. *Gore District Mutual*, 12 Grant (U. C.) 156, where the assured mortgaged and assigned his policy with the insurer's consent, and thereafter effected fresh insurance.

(*b*) 44 & 45 Vict. c. 41, s. 23 (4).

Right to policy-moneys passing with beneficial interest.—If legatees or devisees under a will, or the widow or heir-at-law or next-of-kin under an intestacy, have a vested interest in real or personal estate which has been insured, it would seem, though it has not been expressly decided, that the proceeds of any policy thereon, in case of a fire after the testator's or intestate's death, will be held by the executor or administrator for the benefit of the person or persons beneficially entitled (*c*). The money clearly represents the goods or land, and, if payable at all, should be payable to the beneficial owner at the time of the fire. If, in the case of chattels, the chattels perish in the life of the testator, or the testator and chattels perish together, it would seem that the legatees thereof will not be entitled to the insurance-money.

The right of action may be only in the representative, but the proceeds recovered by him represent the subject of the insurance, and are held by him on trust for those beneficially interested in the estate (*d*).

Mercantile policies assignable. Rule for calculating loss on mercantile policies.—Mercantile policies on goods, &c., usually called floating policies, are assignable by permission of the insurers in the same way as ordinary fire policies, from which they do not in reality differ except in the mode in which damage is estimated, and in the interests which they cover. In the case of policy on goods with liberty *to charge the cargoes, the mode of calculating [* 305] the amount payable in case of loss is usually as follows, viz.:—The whole value of goods afloat, and covered by the policy, must be taken, and the assured will recover such a proportion of their loss as the full amount insured bears to the value of all the property afloat at the time of the accident, if that value exceed the full amount insured; if not, the assured will be entitled to the whole amount lost (*e*).

(*c*) *Culbertson* v. *Cox*, 48 Am Rep. 204. *Wyman* v. *Wyman*, 26 N. Y. 253. *Parry* v. *Ashley*, 8 Sim. 97. *Durrant* v. *Friend*, 5 De G. & S. 343, 21 L. J. Ch. 353, 19 L. T. 152, 16 Jur. 709, commented on in *Rayner* v. *Preston*, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. N. S. 787, 29 W. R. 547.

(*d*) *Parry* v. *Ashley*, 8 Sim. 97. *Mildmay* v. *Folgham*, 8 Ves. Jun. 472, but see comments thereon in *Culbertson* v. *Cox*, 48 Am. Rep. at p. 209.

(*e*) *Crowley* v. *Cohen*, 8 B. & Ad. 478, 1 L. J. K. B. 158, per Tenterden, C. J. *Joyce* v. *Kennard*, L. R. 7 Q. B. 78, 41 L. J. Q. B. 17, 25 T. L. N. S. 932, 20 W. R. 238.

[* 306] *CHAPTER XVII.

DISPOSITION OF LIFE POLICIES.

Life policies securities for money.—Policies of life assurance are treated as securities for money (*a*) payable at a date uncertain but calculable. The sum insured (apart from bonuses) is certain; the premium or consideration for its payment is also certain; and the time when the money is payable is certain to accrue: "Nihil certius morte, nihil incertius hora mortis."

Surrender.—Their present value then is computable, and assurance offices will accept a surrender of the policy at that sum which is called a surrender value. A man possessed of a policy can also sell it to a third person, or borrow on its security.

Assignability of life policies. Nature of contract. Insurable interest, when must exist.—Life policies are now construed as contracts, not to indemnify, but to pay a certain sum in a certain event depending on the duration of human life. If at the time when such contracts are made the assured has an insurable interest in the life on which the contract is made, the contract is valid (*b*), and will not be affected by the determination of such interest before the happening of the event insured against (*c*).

It follows from this that an assignment of a life policy [* 307] would be valid and pass to the assignee the *right to the insurance-money, even though the assignor's interest in the life had ceased before the date of the assignment. A creditor may insure his debtor's life, and the very next day sell the policy to a third person, who is a debtor of the life assured, and therefore would have had no assurable interest in the life enabling him to have effected the policy.

Married woman may insure husband's life.—Under the Married Women's Property Act, 1882 (*d*), a wife may insure her own or her husband's life for her separate use, and the same and all benefit thereof will enure accordingly. In America also a married woman may insure her husband's life and dispose of the policy, for "if she

(*a*) *Stokoe* v. *Cowan*, 30 L. J. Ch. 882, 7 Jur. N. S. 901, 4 L. T. N. S. 695, 9 W. R. 801, 29 Beav. 637 (1861), per Romilly, M. R., and case there cited.

(*b*) *Ashley* v. *Ashley*, 3 Sim. 149, per Shadwell, V. C. (1829).

(*c*) *Dalby* v. *India and London*, 15 C. B. 365, 24 L J. C. P. 2, 18 Jur. 1024, 24 L. T. O. S. 182, 3 W. R. 116. *Law* v *London Indisputable*, 1 K. & J. 223, 24 L. J. Ch. 196, 1 Jur. N. S. 179, 3 W. R. 155, 24 L. T. 208. But see *Vezina* v. *New York Life*, 6 Canada 30.

(*d*) 45 & 46 Vict. c. 75, s. 11.

pays the premium out of her own pocket, it is hard to see why she should not be able to assign the policy" (*e*).

Interest in policy on own life.—A policy on a man's own life, expressed to be payable to his executors or administrators, is a reversionary interest (*f*), certain to fall in on the assured's own death or attainment of the stipulated age. It forms part of the estate of the assured, being money due and owing to him at his death (*g*), and may be dealt with at his absolute discretion—sold, charged, settled (*h*), given away (*i*), bequeathed (*k*), or made subject of a *donatio mortis causâ* (*l*), and passes to his trustee in bankruptcy (*m*).

Policy assignable before payable.—The fact that the money secured by the policy has not become due does not affect the right to assign or the possibility of an absolute assignment (*n*).

*A policy, though a chose in action (*o*), is not within the [* 308] order and disposition clause of the Bankruptcy Acts, 1869 and 1883 (*o*), nor a negotiable instrument (*p*). The legal title to a policy of life assurance can be obtained by assignment in accordance with the Policies of Life Assurance Act, or s. 25, sub-s. 6, of the Judicature Act, 1873. An assignment upon trust may be an absolute assignment within the latter Act, and the assignee under such an assignment can give a good discharge for the policy-moneys (*q*).

Donatio mortis causâ. Inter vivos.—A life policy has been held a proper subject of *donatio mortis causa* (*r*) on account of its analogy to a bond. And it would seem that trover cannot be maintained for it by the executor or administrator of the assured (*r*), if the latter has given it away without writing during his lifetime (*s*); but, on the other hand, a person to whom it has simply been handed without writing by the assured in his lifetime cannot re-

(*e*) *Chapin* v. *Fellows*, 36 Conn. 132, 4 Am. Rep. 49.

(*f*) But see *Rawbone's Will*, 3 K. & J. 300, 476, 3 W. R. 796, 26 L. J. Ch. 509, 29 L. T. 155.

(*g*) *Pelly* v. *Wilson*, 17 W. R. 778, 4 Ch. App. 574.

(*h*) *Sewell* v. *King*, 14 Ch. D. 179, 28 W. R. 344.

(*i*) *Rummens* v. *Hare*, 1 Ex. D. 169, 34 L. T. N. S. 407, 24 W. R. 385.

(*k*) *M'Donald* v. *Irvine*, 8 Ch. D. 101, 47 L. J. Ch. 494, 38 L. T. N. S. 155, 26 W. R. 381.

(*l*) *Amis* v. *Witt*, 33 Beav. 619. *Witt* v. *Amis*, 1 B. & S. 109, 30 L. J. Q. B. 318, 9 W. R. 691, 7 Jur. N. S. 499, 4 L. T. N. S. 283.

(*m*) *Jackson* v. *Forster*, 1 E. & E. 463, 29 L. J. Q. B. 8, 33 L. T. 290, 7 W. R. 578.

(*n*) *Brice* v. *Bannister*, 3 Q. B. D. 569, 38 L. T. N. S. 739, 26 W. R. 670.

(*o*) Ex parte *Ibbetson*, 8 Ch. D. 519, 39 L. T. N. S. 1 26 W. R. 843.

(*p*) *Strachan* v. *M'Dougle* (1835). 13 C. S. C. (1st series) 954. *United Kingdom Life* v. *Dixon* (1838), 16 C. S. C. (1st series) 1277.

(*q*) *Burlinson* v. *Hall*, 12 Q B. D. 347.

(*r*) *Witt* v. *Amis*, *ubi sup* note (*l*).

(*s*) *Rummens* v. *Hare*, 1 Ex. D. (C. A.) 169, 34 L. T. N. S. 407, 24 W. R. 385. *Barton* v. *Gainer*, 3 H. & N. 387, 27 L. J. Ex. 390, 6 W. R. 624.

cover from the assurers thereon (*t*). If the executor or administrator has subsequently regained possession of it, he can give a good discharge to the insurers, but not otherwise (*u*).

Gift of life policy and retention of same by donor.—Where a man effected an insurance on his own life but in his daughter's name, and paid the premiums himself, though he retained the policy in his own possession, it was held a complete gift to his daughter, and on his death she was held entitled to the insurance-money [* 309] (*x*). In this case a policy of life assurance was *effected by a man on his own life, but in his daughter's name, and up to the time of his death he retained the policy in his own possession and paid all the premiums himself from time to time, except the last, which was, through his want of funds, paid by his son. There was no mention of the policy in the will of the assured; but he communicated the fact of the insurance to his daughter, and gave her to understand that it was for her benefit. Kay, J., said "that the legal right to call upon the office to pay was clearly in the daughter, and not in the executor, the contract of the assurance company having been to pay her. That she was the daughter was sufficient to raise a presumption that the advance was to her, and the only thing that could be relied on to rebut this presumption of advancement was the fact that the father kept the policy in his own hands. But that was not sufficient. The mere retention of the policy did not show that the beneficial interest also was not intended to pass to her. Thus the gift of the policy to the daughter was a complete one, for the legal and the beneficial interest were vested in her." Accordingly she was entitled to receive the sum assured.

In *Fortescue* v. *Barnett* (*y*) the assured made a voluntary assignment by deed of a policy upon his own life to trustees, for the benefit of his sister and her children if she or they should outlive him. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. No notice of the assignment was given to the insurance office, and the assured afterwards surrendered for a valuable consideration the policy and a bonus declared upon it to the insurance office; and the Court held that upon the delivery of the deed no act remained to be done by the [* 310] grantor to give effect to the assignment *of the policy, and that he was bound to give security to the amount of the value of the policy assured by the deed. The Master of the Rolls said: "The gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the

(*t*) *Howes* v. *Prudential*, 49 L. T. N. S. 133. *O'Hara's Tontine*, 80 L. T. 128, 8 Jur. N S. 1145, 6 W. R. 45.

(*u*) *Conway* v. *Britannia Co.*, 8 Lr. Can. Jur. 162.

(*x*) *Weston* v. *Richardson*, 47 L. T. N. S. 514.

(*y*) 3 M. & K. 36, 2 L J. N. S. Ch. 98. *Sewell* v. *King*, 14 Ch D. 179, 28 W. R 344.

grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the insurance office. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment, but their omission to give notice cannot effect the *cestui que trustent*."

Assignment, how made.—No particular words are necessary to constitute an equitable assignment of a policy of life insurance if the intention be clear; and such an assignment may even be created by word of mouth, and an equitable mortgage may also be created by the deposit of a policy of assurance so as to entitle the depositee to the moneys assured (*z*). The pledge of a fire policy as collateral security is not an assignment within the condition prohibiting assignment (*a*).

To perfect the title of the mortgagee of a policy, notice in writing should be given to the insurance office of the assignment, otherwise a subsequent assignee for value might, by first giving notice, obtain priority (*b*).

By what law construed.—The validity of the assignment will be governed by the law of the place where it was made. And the parties thereto were domiciled. Hence, where a life policy, granted by an English insurance company to the assignor, was by him assigned in Cape Colony to his *wife they being domiciled [* 311] there, the assignment was held invalid in England, because, by the law of Cape Colony, it was void by reason of the assignor and assignee being husband and wife (*c*).

Assignee may sue in own name.—The Policies of Assurance Act, 1867 (*d*), gives the right to sue in their own names to any person or corporation entitled by assignment or other derivative title, and possessing at the time of action brought the right in equity to receive and give an effectual discharge for the policy-moneys.

Policies of Assurance Act, 1867. Assignability.—The effect of this Act is not to make life policies more or less assignable than before; it only enables the assignee to sue in his own name without having to use the name of the assignor, and protects the insurance offices by making notice of assignment necessary. In the words of Lord Bramwell with respect to 31 & 32 Vict. c. 86 (a similar Act as to marine policies), "Without the aid of the statute, the assign might have sued at law in the name of the assured and in a court of

(*z*) *Row* v. *Dawson*, 1 Ves. Sen. 331. *Gurnell* v *Gardner*, 4 Giff 626–680, 9 L T. N. S. 367, 12 W R. 67.

(*a*) *Griffey* v. *New York Central Co.*, 53 Am. Rep. 202, 55 Sickell (N. Y.) 417.

(*b*) 30 & 31 Vict. c. 144, s. 3. Judicature Act, 1873, s. 25, sub-s 6. *Swayne* v. *Swayne*, 11 Beav. 463. *Ettey* v. *Bridges*, 2 Y & C. Ch. 486. Re *Barr's Trusts*, 4 K. & J. 219, 6 W. R. 424.

(*c*) *Lee* v. *Abdy*, 17 Q. B D. 309, 34 W. R 653; see also *Mutual Life Insurance Co.* v. *Allen*, 52 Am. Rep. 247, 138 Mass. 24; and *Reese* v. *Mutual Benefit Co.*, 28 N. Y. 516; and cap. xxiii. *post*.

(*d*) 30 & 31 Vict. c. 144, s. 1.

equity in his own name. The statute was passed to give the assign a more convenient remedy. No alteration in the rights of the parties was contemplated" (*e*).

Notice of assignment. Life. Fire.—Notice of assignment of a life policy to an agent of the company is not, under the present law, sufficient to vest the legal title in the assignee (*f*). Under the old law it might be enough if the agent was not forbidden by the insurers to receive such notice (*g*). Fire policies are in a different position, not being of the same nature as life policies, nor included in the provision of the Policies of Life Assurance (1867) Act (*h*).

[* 312] *The law as to order and disposition is not the same in Ireland, to which country the Bankruptcy Acts of 1869 and 1883 have not yet been extended (*i*). But the Policies of Life Assurance Act applies to the whole of the United Kingdom, and the assignee of a policy can thereby perfect his legal title by the same procedure in any part thereof.

Effect of assignment of policy under the Act.—By s. 3 of the Act (*j*) it is provided that no assignment made, after the passing of the Act, of a policy of life assurance shall confer on the assignor, his executors, administrators, or assigns, any right to sue for the amount of such policy until a written notice of the date and purport of such assignment shall have been given to the insurance company at their principal place of business, or one of their principal places of business, in England or Scotland or Ireland; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bona fide* made by the company before the date on which such notice shall have been received by the company shall be as valid against the assignee as if the Act had not passed.

Notice of assignment.—The notice required by this section (3) should be given even in the case of a mortgage to the company itself, in order to avoid any contention as to whether the requirements of the section upon which the priority of claims is made dependent have been complied with (*k*).

Act passed for protection of companies.—This statute was passed for the protection of assurance companies, and not for the purpose of regulating the priority of assignees of policies *inter se*, and therefore the assignee of a policy who had given due notice to the company under s. 3, but who had notice of a prior incumbrance, would

[* 313] not obtain priority over the *first incumbrancer, although

(*e*) *Pellas* v. *Neptune Co.*, 5 C. P. D. 34, 49 L. J. C. P. 153, 42 L. T. N S. 35, 28 W. R. 405.
(*f*) 30 & 31 Vict c. 144, ss 3. 4.
(*g*) *Gale* v. *Lewis*, 9 Q. B. 730, 16 L J. Q. B. 119.
(*h*) Ex parte *Hennesey*, 1 Connor & Lawson (Ir.) 559.
(*i*) Re *Russell*, 1 Cr. & D. (Ir.) 27. Re *Armstrong and Byrne*, 1 Cr. & D. (Ir.) 37.
(*j*) 30 & 31 Vict. c. 144.
(*k*) Davidson's Precedents, vol. 2, pt. 2, p. 522.

the notice given by such incumbrancer was not according to the Act (*l*).

Principle place of business to be on policy.—Every insurance company must on every policy specify their principle place or places of business at which notice of an assignment may be given (s. 4).

Form of assignment.—Any assignment may be made, either by indorsement on the policy or by a separate instrument in the form given in the schedule to the Act (s. 5).

Company to acknowledge receipt of notice.—Every insurance company is bound, upon the request in writing of any person by whom any such notice was given or issued, or of his executors or administrators, and upon payment of five shillings, to deliver an acknowledgement in writing of their receipt of such notice; and every such acknowledgement, if signed by a person who is *de facto* or *de jure* the manager, secretary, treasurer, or other principal officer of the company, shall be conclusive evidence of the company having duly received such notice (s. 6).

Notice of assignment should be given at once.—There should be no delay in giving notice of assignment of a policy of insurance, for in the absence of notice, if the insurance company paid the policy-money to the assignor of the policy, or his legal personal representative, without knowledge of the assignment, they could not be made to pay the money again (*m*), and the assignment might be defeated by the assignor surrendering the policy or the bonuses to the office (*n*).

Inquiry as to previous notice.—No person should take an assignment of a policy of insurance without first inquiring of the insurance company whether they have previously received notice of any assignment, charge, or lien thereupon. When the notice has been given to the proper person, he cannot *disregard [* 314] it without making himself liable to the assignee (*o*). If he made, even though unintentionally, a false representation to an intending assignee as to previous notice, he is personally liable for the loss such assignee may sustain (*p*).

Assignment under Judicature Act.—By the Judicature Act, 1873, s. 25, sub-s. 6, any *absolute* assignment in writing, not purporting to be by way of charge only of any legal chose in action of which express notice in writing has been given to the person from whom the assignor would have been entitled to receive the same, will pass the legal right and power to give a good discharge for the same

(*l*) *Newman* v. *Newman*, 28 Ch. D. 674, 54 L. J. Ch. 598, 52 L. T. 422, 33 W. R. 505.

(*m*) *Jones* v. *Gibbons*, 9 Ves. 407, 410.

(*n*) *Fortescue* v. *Barnett*, 3 M. & K. R. 36, 2 L. J. N. S. Ch. 98. *Stocks* v. *Dobson*, 17 Jur. 228, 22 L. J. Ch. 884.

(*o*) *Williams* v. *Thorp*, 2 Sim. 257. *Baldwin* v. *Billingsley*, 2 Vern. 539. *Roberts* v. *Lloyd*, 2 Beav. 376. *Andrews* v. *Bousfield*, 10 Beav. 511.

(*p*) *Lyde* v. *Barnard*, 1 M. & W. 101. *Swan* v. *Phillips*, 3 N. & P. 447. *Burrows* v. *Lock*, 10 Ves. 470. *Ramshire* v. *Bolton*, L. R. 8 Eq. 294, 38 L. J. Ch. 594, 21 L. T. N. S. 50, 17 W. R. 986.

without the concurrence of the assignor. This provision extends to the assignment of a policy of assurance which is a chose in action (*q*). It is in one respect narrower than the provision contained in the Policies of Assurance Act, 1867, inasmuch as it is limited to absolute assignments only, whilst the Policies of Assurance Act extends to assignments which are absolute as well as to assignments by way of charge. In another respect, however, the provision of the Judicature Act is wider than that of the Policies of Assurance Act, because it extends to "any legal chose in action," and therefore to all policies. The Policies of Assurance Act, on the other hand, extends only to policies granted by a corporation, association, society, or company (*r*).

What is not an assignment within Policy of Assurance Act, 1867.—An agreement in writing, without delivery of the policy, to execute on request an effectual mortgage of a life policy as security for a loan is not an assignment within the meaning of the Policies of Assurance Act, 1867. Consequently, notice to the assurance company of such agreement gave no priority over a prior equitable [* 315] *mortgagee who had given no notice, but who had possession of the policy (*s*). It has been held in America that delivery of the policy itself is necessary (*inter alia*) to constitute an assignment (*t*), but this does not seem to be the rule in England (*u*).

Deposit of policies with a creditor as security, coupled with a request by letter to him to instruct his solicitor to prepare the necessary assignment, is not an equitable assignment within the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144). Consequuently, written notice to the company will not in such a case be enough to enable the depositee to give the insurer an effectual discharge. Jessel, M. R., said: "No consideration was stated, and there was no agreement to assign. There had been a deposit, and there was to be an assignment only if the plaintiff (the mortgagee) thought fit. For some reason or other, he did not choose to take the assignment, but was content to rely on the deposit" (*x*). The Court, however, considering that sufficient proof had been given that the money was really due to the mortgagee, dispensed with the executors of the mortgagor (by 15 & 16 Vict. c. 86, s. 44) (*y*). But it was doubted by the Court of Appeal whether this course was admissible (*z*).

(*q*) Ex parte *Ibbetson*, 8 Ch. D. 519, 39 L. T. N. S. 1, 26 W. R. 843.
(*r*) 30 & 31 Vict. c. 144, s. 7.
(*s*) *Spencer* v. *Clarke*, 9 Ch. D. 137, 47 L. J. Ch. 692, 27 W. R. 133.
(*t*) See *Palmer* v *Merrill*, 60 Mass. (6 Cush.) 282. But see Bliss Life Insurance, p. 511, note 1.
(*u*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176, 21 L. J. Ch. 577. *Ward* v. *Audland*, 8 Sim. 571, C. P. Cooper, 446, 8 Beav. 201.
(*x*) *Crossley* v. *City of Glasgow Life*, 4 Ch. D. 421, per Jessel, M. R. (1876), 46 L. J. Ch. 65, 36 L. T. N. S 285, 25 W. R. 264.
(*y*) *Ibid.*
(*z*) See per Cotton and James, L.JJ., in *Webster* v. *British Empire Mutual*, 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. N. S. 229, 28 W. R. 818. But see also *Curtius* v. *Caledonian*, 19 Ch. D. 534, 51 L. J. Ch. 80, 30 W. R. 125, 45 L. T. N. S. 662.

Equitable assignment.—A covenant to effect a policy by way of security is not enough of itself to vest the policy in the covenantee (*a*); it does not seem to operate as an *equitable as [* 316] signment thereof, or to give him a lien thereon.

But in *Ward* v. *Ward* (*a*), a covenant by a defaulting trustee to effect a policy on his own life was held to entitle the *cestuis que trustent* to the proceeds against his creditors.

Bare deposit of policy.—Mere deposit of a policy with a creditor as security, notice whereof was given to the insurers after the death of the assured, is not sufficient to entitle the creditor to demand payment from the insurance company without the concurrence of the debtor's legal personal representative.

Interest on sum assured.—And if the creditor makes good his claim, the insurers will not be liable to pay interest from the due date where the delay is owing to the creditor's neglect to clothe himself with the legal title to the money (*b*).

Position of assignee no better than that of his assignor.—The assignee of a policy will not be in any better position than the person who effected and assigned it to him (*c*). Thus B., at the instance of the agent of the British Equitable Insurance Company, proposed to insure his life, answered the questions as to his health satisfactorily, and mentioned D. as his last medical attendant, and, the medical officer of the company reporting favourably, the proposal was accepted, and a letter written giving notice that the office would not be liable for any risk in consequence of a variation in health between the acceptance of the proposal and the actual receipt of the first premium. B., becoming suddenly stout, was alarmed, and consulted W., a physician, *who told him he was in [* 317] danger, and wrote to D. to that effect. D. taking a more favorable view, B. then paid the first premium, and never communicated to the office his consultation with W.; and with the receipt for such premium was a letter expressing that if any alteration in health had occurred the policy would be void. B. assigned the policy as security for a debt to the V. of N. Railway Co., represented subsequently by the York Co., and died suddenly of disease of the heart, and a jury returned that verdict. An action was brought on the policy in the name of the widow; and it was held that the non-communication by B. to the office of the fact of his consulting W., although he was not bound to say what W. told him, vitiated the

(*a*) *Lees* v. *Whitely*, 2 Eq. 143, 35 L. J. Ch. 412, 14 L. T. N. S. 472, 14 W. R. 534. See, however, Ex parte, *Caldwell*, 20 W. R. 368, 18 Eq. 188.

(*a*) 18 Jur. 539.

(*b*) *Webster* v. *British Empire Mutual*, 15 Ch. D. 169, C. A. (1880), *ubi supra*.

(*c*) *Dormay* v. *Borrodaile*, 10 Beav. 335, 16 L. J. Ch. 337. *British Equitable* v. *Great Western Railway*, 20 L. T. N. S. 422, 38 L. J. Ch. 314, 17 W. R. 48, 561. *Anderson* v. *Fitzgerald*, 4 H. L. C. 484, 17 Jur. 995. and *Scottish Widows' Fund* v. *Buist*, 3 C. S. C. (4th series) 1078, 5 do 64 (H. L.) Policies of Assurance Act, 1867, s. 2. *Mangles* v. *Dixon*, 3 H. L. C. 702 (1852). *Purdew* v. *Jackson*, 1 Russ. 1

policy, and that the defendants were in no better position than B. (*d*).

The assignee is liable to all the defences which the insurers would be entitled to raise against the assignor; for if the policy be affected by any vice in regard to the assignor, it is also similarly affected as regards the assignee. *Policy effected by fraud, insurer can recover money paid.*—So if the assignor have affected the policy by fraud practiced against the insurer, and subsequently assigned, and the assignee be at the time ignorant of the fraud, and the insurer pays the assignee, both being in equal ignorance of the fraud, the insurer may recover from the assignee the money paid under such mistake (*e*).

Duty of insurer knowing assignee is deceived.—But if the notice of assignment given to the insurer discloses on the face of it that which induces the belief that the assignee has been deceived in accepting the assignment, the insurer is bound to inform the assignee of the real circumstances; and, if he does not, he will be estopped from taking advantage of the equities existing as between the assignor and himself (*f*).

[* 318] **Aggravation of illness between acceptance of life and payment of premium. Bonâ fide purchaser.*—When the health of the life grew worse between the acceptance of the risk and payment of the premium, but the aggravation of the illness was not disclosed to the insurers, the policy was held vitiated, and *bonâ fide* purchasers for value (*f*) without notice were held to have no title to recover thereon (*g*).

Receipts of premiums by company after knowledge of invalidity of assigned policy.—If after a policy has been assigned the insurance company become aware of objections to its validity so clear and conclusive that the mere statement of them is enough, there may be a duty of communication to those whom the company know to be interested in the policy. It would not be consistent with good faith that they should in such circumstances go on receiving the premiums on a policy that they intended to challenge in the end (*h*).

In certain companies (mutual) the assignee of a policy, by payment of premium, is held to have contracted to become a member of the company, and is liable to be entered on the register as a contributory; but if the directors refuse to register the assignee as a

(*d*) *British Equitable* v. *G. W. R. Co.*, *supra.*

(*e*) *Lefevre* v. *Boyle*, 1 L. J. N. S. K. B. 199, 3 B. & Ad. 877.

(*f*) *Mangles* v. *Dixon*, 3 H. L. C. 702.

(*f*) For precautions to be observed by purchaser or mortgage of life policies, see 2 Dav. Prec. Conv. pt. 1, p. 654 note.

(*g*) *British Equitable* v. *Great Western Railway* (1869), 38 L. J. Ch. 814, 17 W. R. 561, 20 L. T. N. S. 422. Policies of Assurance Act, 1867, explained as not giving the asssign a better title, but only as dispensing with administration where the assign had a complete title.

(*h*) *Scottish Equitable* v. *Buist*, 4 C. S. C. (4th series) 1081–82, per Lord President.

member of the company, the Court will in certain cases hold him not to have become a contributory (*i*).

Assignment before winding up.—On the other hand, assignment before winding up of such a company relieves the assignor (*k*).

Payment into court by company under Trustee Relief Act—The Trustee Relief Act, until extended by the 6th sub-s. of s. 25 of the Judicature Act, 1873, did not enable an insurance company, having notice of *conflicting claims, to pay policy-moneys into [* 319] court, unless the moneys were the subject of a trust (*l*); but, inasmuch as, by the Policies of Assurance Act, 1867 (*m*), an unsatisfied mortgagee of a policy might sue the insurance office in his own name on his assignment, the insurance office would be justified in requiring evidence that an assignment by way of mortgage of which they had notice was satisfied before they paid over the money to a subsequent assignee of the policy (*n*).

Validity of assignee's claim not effected by length of time between notice of assignment and death of assured.—It does not matter if the last assignment of which notice has been given to the insurer is over twenty years old, for no demand can be made under it until the event happens in which the policy-money is to become due. In *Haycock's Policy* twenty-four years had elapsed between the assignment by way of mortgage and the death of the assured. The latter had subsequently to the mortgage assigned the policy to a third person, and he to the petitioners in that case. But absence of claim on the part of the mortgagee was not held to be any evidence that the claim had been satisfied, and no suggestion was made that it was barred. And the policy-moneys were only paid out of court on the personal representative of the mortgagee disclaiming any interest therein.

Specific performance of contract to assign. Free from incumbrances.—A contract to assign a life policy may be ordered to be specifically performed (*o*). And under such a contract, unless otherwise agreed, the assignment must be free of incumbrances. So if a contract is made to assign a policy, and the assignor had (unknown to the would-be assignee) agreed that one-third of the premiums should be a charge on the policy payable at his death, *the [* 320] burden of such charge must be satisfied by the assignor and not transferred to the assignee (*p*). Such contract passes all the

(*i*) Ex parte *Saunders* (1882), 20 Ch. D. 403, 51 L. J. Ch. 579, 47 L. T. N. S. 112.

(*k*) Ex parte *Brown* (1881), 18 Ch. D. 639, 50 L. J. Ch. 714, 45 L. T. N. S. 269, 30 W. R. 30.

(*l*) *Matthew* v. *Northern, &c., Co.*, 9 Ch. D. 80, 38 L. T. N. S. 468, 47 L. J. Ch. 562.

(*m*) 30 & 31 Vict. c. 144.

(*n*) Re *Haycock's Policy*, 1 Ch. D. 611, 45 L. J. Ch. 247, 24 W. R. 291.

(*o*) *Ashley* v. *Ashley*, 3 Sim. 149. *Godsall* v. *Webb*, 2 Keen 99.

(*p*) *Gatayes* v. *Flather*, 34 Beav. 387, per Romilly, M. R.

benefits attached to the policies, such as bonuses, &c. (*q*), without further words.

Bankruptcy of assured. Payment of premiums by assignee.—A policy effected on own life at an annual premium, on bankruptcy of the assured passes to his trustee, however small be its apparent value at such date, and even if there are considerable arrears of premium due thereon. If he disclaim, the grantee can do what he likes about it (*r*). If the assured, instead of delivering up the policy as part of his effects, secretly assign it to another person, who pays the arrears of premium, and upon the death of the bankrupt receives the sum insured, this sum, less the amount of arrears so paid, may be recovered by the trustees in bankruptcy as money had and received to their use (*s*).

So also if the bankrupt surrender the policy and procure renewal to one creditor in consideration of his accepting the compensation offered (*t*).

Covenant to keep policy on foot.—If a policy be assigned with other property, that the latter assignment should be avoided will not affect the assignee's right to the policy (*u*).

An assignment of a policy of assurance by the *cestui que vie* ought to contain an express covenant by him that he will not do anything to vitiate the policy or prevent the assignee from receiving [* 321] the money. A *covenant simply to do all things necessary to keep the policy on foot is not broken by his suicide, although the assignee will thereby lose the benefit of the policy (*x*).

Covenant to keep policy on foot whether broken by going abroad.—"Such a covenant may practically prevent the *cestui que vie* from proceeding to any British colony, or even from leaving Europe; for most of the insurance offices make residence or travelling out of Europe vitiate a policy, and a Court of Equity will restrain a man from committing a breach of his own covenant. Permission to reside or travel abroad in healthy latitudes may, however, usually be obtained from the office on payment of an increased premium; and a covenant to pay an increased premium, which may become payable in the event of the assignee allowing the *cestui que vie* to go abroad, should be inserted in the assignment. *Breach of conditions of policy by covenantor. Covenantor to keep up policy.*—Of course

(*q*) *Courtney* v. *Ferrars*, 1 Sim. 137, 5 L. J. N. S. Ch. 107. *Parkes* v. *Bott*, 9 Sim. 388.

(*r*) Re *Learmonth*, 14 W. R. 628.

(*s*) *Schondler* v. *Wace*, 1 Camp. 486. See *West* v. *Reid*, 2 Hare 256, and *Pennell* v. *Millar*, 23 Beav. 172, 5 W. R. 215, 29 L. T. 85, where assignor had covenanted to keep up policies and assign had paid the premiums. See also *Burridge* v. *Row*, 1 Y. & C. Ch. C. 183, 583, 13 L. J. Ch. 173, 8 Jur. 299. *Connecticut Mutual Life* v. *Burroughs*, 34 Conn. 305.

(*t*) *Pfleger* v. *Browne*, 28 Beav. 391, per Romilly, M. R.

(*u*) *Foster* v. *Roberts*, 7 Jur. N. S. 400, 9 W. R. 605. See *Pennell* v. *Millar*, *supra*. *Bromley* v. *Smith*, 26 Beav. 644.

(*x*) *Borrodaile* v *Hunter*, 5 M. & G. 639, 12 L. J C. P. 225, 5 Scott N. R. 418, 7 Jur. 443. *Dormay* v. *Borrodaile*, 10 Beav. 335, 16 L. J. Ch. 337.

the assignor of a policy has notice of all its conditions, and will, if h avoid the policy by breaking any of its conditions, be responsible under the ordinary covenant not to vitiate the policy; but where one covenanted that he would appear at any insurance office within the bills of mortality, and enable the covenantee to insure his life, and in pursuance of his covenant appeared at an office which subsequently granted to the covenantee a policy containing a condition that the covenantor should not go beyond the limits of Europe, it was held that the covenantee ought to have given the covenantor notice that the insurance had been effected on those terms; and that, not having done so, he could not recover damages for the avoidance of the policy by the covenantor quitting Europe (*y*). But if the covenant be explicit and the covenantor have notice of the terms of the policy, the covenant will be construed strictly, and the covenantee may enter up a judgment and issue execution against the covenantor *for neglecting to keep the pol- [* 322] icy on foot, notwithstanding he may himself have obtained its renewal" (*z*).

An action will lie for breach of covenant to effect and settle a policy, and the damage caused by the breach may be proved for (*a*).

Non-assignable life insurances.—Insurances under the Customs Annuity and Benevolent Fund (56 Geo. III. c. lxxiii., 34 & 35 Vict. c. 103 and Rules of 1872 thereunder) are not part of the assured's estate. He has only a limited power of appointment over the funds secured thereby. On making certain payments during his life he acquires a right to appoint a sum of money on his death either for the benefit of his widow, if any, or, if not, of his relatives and nominees if accepted by the directors (*b*).

The appointment being limited, no legacy duty is payable thereon (*c*), but succession duty is payable (*d*).

If no nomination is approved and registered during life, but the assured makes a bequest of such policy, the legatee cannot take, and the assured's children, if any (his wife being dead), are entitled (*e*).

But irrevocable assignment of a certain portion of the sum insured is permitted under certain restrictions by the said Rules (*f*).

The effect of mortgage of such permitted portion would be a disposition *pro tanto;* and his mortgagee's interest, if any, would be

(*y*) *Vyse* v. *Wakefield*, 6 M. & W. 442.
(*z*) *Winthorp* v. *Murray*, 8 Ha. 214 (1852). Davidson's Precedents, 4th ed. vol. 2, p. 656.
(*a*) *Arthur* v. *Wynne*, 14 Ch. D. 603, 49 L. J. Ch. 557, 43 L. T. N. S. 46, 28 W. R. 972.
(*b*) *Attorney-General* v. *Abdy*, 1 H. & C. 266, 32 L. J. Ex. 9.
(*c*) *Attorney-General* v. *Rousel*, Tilsley on Stamps 685 (2nd ed.).
(*d*) *Attorney-General* v. *Abdy*, *supra*. Succession Duty Act (16 & 17 Vict. c. 51), s. 17.
(*e*) *W. Phillips' Insurance*, 28 Ch. D. 235, 52 L. J. Ch. 44, 48 L. T. N. S. 81, 31 W. R. 511
(*f*) *M'Lean's Trusts*, 19 Eq. 274, per Jessel M. R. (1874).

subject to the dispositions of the assured's will, or the rules
[* 323] of the society. The *assignees or mortgagees of such a policy will not be liable to succession duty (*g*).

The assured may settle his share of the benevolent fund to trustees, for the benefit of his daughter on her marriage. Such settlement is within the words of the rule, "for the benefit of the child or children." No admission of the trustees or the husband as nominees, nor any consent of the directors of fund, is necessary (*h*).

Friendly societies—Insurances made under the Friendly Societies Acts (38 & 39 Vict. c. 60, 30 & 40 Vict. c. 32) are not assignable, and we believe are treated by the Registrar of Friendly Societies as non-assignable. The (assured) member may, however, by writing under his hand, delivered or sent to the society at its registered office, nominate any person as the recipient, in case of his (the member's) death, of any sum from the society not exceeding £50. But such nomination is revocable in the same manner. It seems only to amount to a power of revocable appointment, and no contract not to revoke would bind the society.

This power of nomination is confined to members who have attained sixteen years of age (*i*).

Insurances on children's lives under ten.—When assurances are made on the lives of children under the Friendly Societies Act, 1875, the only people who can receive money are the parents, or their personal representatives, s. 28 (2).

Insurances effected through the Post Office also are not assignable, but a power of nomination is given. The same rule applies to the Customs Benevolent Fund, and, it would seem, to various Indian Civil Service Funds.

[* 324] **Post Office insurances.*—Assignments of Post Office insurances or annuities are subject to the provisions of 27 & 28 Vict. c. 43 s. 11, and the Rules made under the Act (*j*).

Assignment of void policy.—The assignee cannot recover on a policy void for fraud of the assignor, or for misrepresentations in the proposals (*k*).

In an ordinary life policy the assignee for value can recover by the terms thereof.

Legal means lawful.—The words "legal" in a *proviso* which avoids the policy, "except it shall have been legally assigned," means lawful, not legal, as opposed to equitable (*l*).

Authority to hold amounts to assignment.—Authority to hold the policy for any bills or notes cashed for the grantee has also been

(*g*) *M'Lean's Trusts*, *supra* 15 & 16 Vict. c. 51 (Succession Duty Act), s. 17.
(*h*) *Pocock's Policy*, 6 Ch. App. 447, 25 L. T N. S. 238, 19 W. R. 801.
(*i*) 38 & 39 Vict. c. 60, s. 15 (3).
(*j*) 30 & 31 Vict. c. 144, s. 8. 16 & 17 Vict. c. 45; 27 & 28 Vict. c. 43.
(*k*) *British Equitable* v. *Great Western Railway*, 19 L. T. N. S. 476, per Malins, V. C. (1869), affd. 20 L. T. N. S. 422, 17 W. R. 43, 38 L. J. Ch. 132, 314.
(*l*) *Dufaur* v. *Professional*, 25 Beav. 599, 4 Jur. N. S. 841, 27 L. J. Ch. 817, 32 L. T. 25

held to be an assignment within the terms of a policy containing the following words: "unless it shall have been assigned for valuable consideration six months before death" (*m*).

Insurers can't avoid policy and claim advance.—The insurers, if they make advances on a policy, are third persons for that purpose, and cannot avoid the policy and claim the debt (*n*).

Bankruptcy.—But if the policy pass by operation of law to a trustee in bankruptcy, this is not an assignment within the above exception.

Void assignment as security for antecedent debt.—An assignment of a policy which is voluntary and void under 13 Eliz. c. 5, may nevertheless be allowed as a *charge on the policy to [* 325] the extent of an antecedent debt, in consideration of which it was assigned (*o*).

An assignment by way of charge with a trust as to the surplus in favour of a third person has been held void against creditors as to such trusts (*p*).

So will be assignment by a bankrupt of an undisclosed policy (*q*).

Assignment by felon.—But a felonious taking of property so far raises a debt as to support the assignment of a policy by the felon before conviction as security for the sum taken (*r*).

Gift of policy.—Gift of a policy is not valid against creditors, if the settlor was at the time insolvent (*s*). But once completely made, it is not revocable by the donor (*t*).

To constitute such a gift the policy may simply be delivered over with appropriate declarations (*u*), or be assigned in writing (*x*), or declared to be held by the donor in trust for the donee (*y*), or directed to be held by a trustee (*z*), an insurer (*a*), or a bailee for a particular purpose.

Expression of desire to settle policy may amount to assignment.—Where a man had made a settlement on his first marriage, and, being a widower and desiring to marry again, wrote to one of the trustees

(*m*) *Jones* v. *Consolidated*, 26 Beav. 256, 5 Jur. N. S. 214. 28 L. J. Ch. 66, 32 L T. 307. *Moore* v. *Woolsey*, 4 E. & B. 243, 24 L. J. Q. B. 40, 1 Jur. N. S. 468, 24 L. T. 155, 3 W. R. 66, 3 C. L. Rep. 207 *White* v. *British Empire*, 7 Eq 394, 38 L. J. Ch. 53, 17 W. R 26, 19 L. T. N. S. 306.

(*n*) *Jackson* v. *Forster*, 1 E. & E. 468, 5 Jur. N. S. 1247, 29 L. J. Q. B. 8, 33 L. T. 290, 7 W. R. 578.

(*o*) *Stokoe* v. *Cowan*, 30 L. J. Ch. 882, 29 Beav. 637, 4 L. T. N. S. 695, 7 Jur. N. S. 901, 9 W. R 801.

(*p*) *Magawley's Trusts*, 5 De G. & Sm. 1, 15 Jur. 1005.

(*q*) *Schondler* v. *Wace*, 1 Camp. 487. Re *Smith*, 12 W. R. 584.

(*r*) *Chowne* v. *Baylis*, 31 Beav. 351, 11 W. R. 5, 6 L. T. N. S. 739, 31 L. J. Ch. 757, 8 Jur. N. S. 1028.

(*s*) *Magawley's Trust*, 5 De G. & S. 1, 15 Jur. 1005.

(*t*) *Rummens* v. *Hare*, 1 Ex. D. 169, 34 L T. N. S. 407, 24 W. R. 385.

(*u*) *Barton* v. *Gainer*, 3 H. & N. 387, 27 L. J. Ex. 390.

(*x*) *Howes* v. *Prudential Assurance*, 49 L. T. N. S. 133.

(*y*) *Sewell* v. *King*, 14 Ch. D. 179, 28 W. R 344

(*z*) *Magawley's Trust*, *supra*, per Parker, V. C

(*a*) Such are policies under Married Women's Property Acts.

thereof saying that he desired to make a settlement (of six policies on his own life) on the children by the first marriage, and handed three to one trustee, and told him that the others were in a [* 326] bank as collateral security for a loan, but *that he would pay off the said loan, but made no legal assignment, and no notice was given to the insurers or the other trustee, Hall, V. C., held:—

(1) That the evidence showed a complete assignment.

(2) That the person whose duty it was to give notice to the insurers was the trustee, and not the settlor.

(3) That such notice only gave a legal title to sue in the assign's own name, and nothing more (*b*).

Policy settlement on same footing as other property.—Where the policy is so framed as to be part of his own estate, the grantee can settle it in the same way in which he could settle any other personal property, and subject to the same liability to have his settlement set aside by creditors as attends on any voluntary settlement (*c*).

Non-performance by the husband of his covenant to effect and settle a policy will not debar him from insisting on performance by his wife's father of his covenant to settle property on similar trusts (*d*).

Names of persons interested must appear in policy—both the names of trustee and c. q. t.—The statute prohibits the making an insurance on the life of any person or any other event whereon the person for whose benefit or on whose account the policy shall be made shall have no interest, and renders void every policy made contrary to the Act. It also renders it imperative to insert in the policy the names of the persons interested therein (*e*). But the statute [* 327] *does not prohibit a policy being granted to one person in trust for another where the names of both persons appear on the face of the policy (*f*).

Trustee enabling settlor to dispose of policy is liable.—When by a marriage settlement the husband assigned a life policy to two trustees and covenanted to pay the premiums, one of the trustees having disclaimed, the other enabled the husband to dispose of the policy and a bonus thereon, and it was held that he was liable to pay to the trust estate the money actually received for the policy (*g*).

(*b*) *Sewell* v. *King*, 14 Ch. D. 179, per Hall, V. C., 28 W. R. 344, following *Fortescue* v. *Barnett*. 3 My. & K 36, 2 L. J. N. S Ch. 98; *Pearson* v. *Amicable*, 27 Beav. 229, 7 W. R. 629; *Kekewich* v. *Manning*, 1 D. M. & G. 176, 21 L. J. Ch. 577. See *Milroy* v. *Lord*, 4 D. F. & J. 264.

(*c*) See *Holt* v. *Everall*, 2 Ch. D. 266, 45 L. J. Ch. 433, 34 L. T. N. S. 599, 24 W. R. 471, as to mode of turning a policy on own life into one in favour of wife and children.

(*d*) *Jeston* v. *Key*, 6 Ch. App. 610.

(*e*) *Hodson* v. *Observer Society*, 8 El. & Bl. 40, 26 L. J. Q. B. 303, 29 L. T. 278, 5 W. R. 712, 3 Jur. N. S. 1125. *Shilling* v. *Accidental*, 2 H. & N. 42, 1 F. & F. 116, 26 L J. Ex. 266, 27 do. 16, 5 W R. 567.

(*f*) *Collett* v. *Morrison*, 9 Hare 162, 21 L. J. Ch. 873.

(*g*) *Kingdom* v. *Castleman*, 46 L. J. Ch. 443.

Trustees may sell where settler can't keep up policy.—Where a policy has been settled and the settlor is unable to perform his covenant to keep up the premiums, the Court will authorize the trustees to sell or surrender the policy (*h*).

When trustee must keep policy up.—If an annuity or life policy is in settlement, it is the implied duty of the trustee to keep it up. It is otherwise, however, if he does not insure, but simply pays the premiums as an agent (*i*). If a trustee who insures does not keep the policy up, he is liable to his *cestui que trust* if he had funds in hand to pay the premiums (*k*), but it is otherwise if he had not funds and could not get any (*l*). If the trustee advance funds he has a lien on the policy for the amount of his advances (*m*).

Trusts of a policy.—The trusts declared of a policy are similar in nature to those declared of other securities, and are construed in the same way. While they divest the settlor of his interest, a resulting trust or apt terms in the deed may bring it back. Thus a trust for A., but if he predeceased the settlor then for B., unless the settlor should *sell on A.'s decease, has been held to enable [* 328] the settlor to dispose of the policy as he liked on A.'s death by charge or sale (*n*).

Again, trust of a policy cannot be declared by reference in the would-be settlor's will to a letter, though he could give the policy away on his death-bed (*o*).

If there are no funds to keep up a trust policy, the Court will order it to be sold (*p*) or surrendered (*q*).

Policy in names of trustees.—There is an advantage in taking a trust policy in the names of the trustees, as it diminishes the risk of forfeiture, and avoids the necessity of an assignment, and of giving notice to the office.

Assignment of principal money will pass bonus.—Trusts of a policy, whether effected in the names of the trustees or assigned to them, will in general comprise bonuses, as will as the original sum assured. Hence if it be desired, with reference to the practice of the office, or the terms of the policy, that there should be an option of having a bonus applied in diminution of the premium, power for this purpose should be specially given (*r*). Where a husband

(*h*) *Hill* v. *Trenery*, 23 Beav. 16 *Beresford* v. *Beresford*, 23 Beav. 292.
(*i*) *Darcey* v. *Croft*, 9 Ir. Ch. 19.
(*k*) *Marriott* v. *Kinnersley*, Tamlyn 470.
(*l*) *Hobday* v. *Peters*, 28 Beav. 603.
(*m*) *Clach* v. *Holland*, 19 Beav. 262, 273, 2 W. R. 402, 18 Jur. 1007. *Johnson* v. *Swire*, 3 Giff. 194. *Todd* v. *Moorhouse*, L. R. 19 Eq. 69, 23 W. R. 155, 32 L. T. N. S. 8.
(*n*) *Johnson* v. *Ball* (1852), 16 Jur. 538.
(*o*) *Peddler* v. *Mozeley*,, 31 Beav. 159, 7 L. T. N. S. 205.
(*p*) *Hill* v. *Trenery*, (1858), 23 Beav. 16.
(*q*) *Beresford* v. *Beresford*, 23 Beav. 292.
(*r*) *Parkes* v. *Bott*, 9 Sim. 388. *Lackersteen* v. *Lackersteen*, 6 Jur. N. S. 1111, 30 L. J. Ch. 5. *Courtney* v. *Ferrers*, 1 Sim. 137, 5 L. J. O S. Ch. 107. *Gilley* v. *Burley*, 22 Beav. 619. Davidson's Precedents, vol 3, 807.

covenanted to effect and settle an insurance policy, and effected a participating policy, it was held that he was entitled, at his option, to have bonuses paid to him, or applied in reduction of premiums (*s*). And on a bequest of a policy on the life of a person other than the testator, the executors were held entitled to take the bonuses and apply them in reduction of premiums (*t*).

Wife's consent to husband's assignment.—In America it has been held that a life policy by a husband on his own life for the [* 329] benefit of his wife is *assignable during his life, *with her consent*, as collateral security for his debts, where no statute directly prohibits it, and that she is debarred by such consent from recovering the proceeds of the policy (*s*) (1).

In England probably the same would be the case on such a policy, since the wife being alone named would be sole and absolute beneficiary under the policy if she survived her husband (*t*).

If a wife takes out a policy on her husband's life to her separate use, but if she die before the husband, then for her children, the husband cannot deal with the policy (*u*).

In Scotland, under the law as to *communio bonorum* between spouses, it seems that a husband who effects a policy on his wife's life for her benefit can charge the policy during his lifetime (*x*).

Married woman's power to insure.—By the Married Women's Property Act, 1870 (*y*), it is provided that "A married woman may effect a policy of assurance upon her own life, or the life of her husband, for her separate use; and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman."

Husband's policy for benefit of wife.—"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife, for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long [* 330] as any object of *the trust remains, be subject to the control of the husband or his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or Ireland, according as the policy

(*s*) *Hughes* v. *Searle*, W. N. 1885, p. 79.
(*t*) Re *Edmed*, W. N. 1885, p. 152.
(*s*) *Charter Oak Life* v. *Brant*, 4 Am. Rep. 323, 2 Story Eq. Jur. s. 1413.
(*t*) 33 & 34 Vict. c. 93, s. 10; and see *Kerwin* v. *Howard*, 24 Wisc. 108.
(*u*) *Chapin* v. *Fellows*, 36 Conn. 132, 4 Am. Rep. 49,
(*x*) *Thomson's Trustees* v. *Thomson*, 6 C. S. C. (4th series) 1227.
(*y*) 33 & 34 Vict. c. 93, s. 10.

[1] If a man insures his life for his wife's benefit, his surrender of the policy without her consent is inoperative as to her. *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 156.

of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. *Intent to defraud creditors.* —If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid." *Bankruptcy of husband.*—This section controls s. 91 of the Bankruptcy Act, 1869, and preserves the policy to the wife, notwithstanding the bankruptcy of the husband (*z*).

Married Women's Property Act, 1882.—Although the Married Women's Property Act, 1870, and the Married Women's Property Act (1870) Amendment Act, 1874, are repealed by the Married Women's Property Act, 1882, s. 22, this section provides that such repeal shall not effect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife married before the commencement of this Act to sue or to be sued under the provisions of the said repealed Acts, or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Construction of s. 10 Married Women's Property Act, 1870.—In Re *Adam's Policy Trusts* (*a*) a husband effected a policy for the benefit of his wife and children under *the Married Women's [* 331] Property Act, 1870, and died insolvent. His wife and one child of the marriage predeceased him. Upon a petition by his surviving children under the 10th section of the Act for the appointment of a trustee of the policy-money for a declaration as to the rights of the petitioners, the Court held that it had under the 10th section no jurisdiction to do more than make the order appointing a trustee; but since under the policy there was a trust either for his wife for life with remainder to the children, or in the alternative for the wife and children as joint-tenants, the order was directed to be prefaced with an expression of opinion by the Court that the wife took no interest, and that the surviving children took as joint tenants; and it was held by Chitty, J., that a policy effected by a husband under s. 10 of the Married Women's Property Act, 1870, "for the benefit of his wife and children," should be read in conjunction with that section, and should by virtue of the words "separate use" in the section be construed as giving the wife a life interest only, with remainder to the children (*a*).

Where there was a surrender of policy prior to Married Women's

(*z*) *Holt* v. *Everall*, 2 Ch. D. 266, 45 L. J. Ch. 433, 34 L. T. N. S. 599, 24 W. R. 471.

(*a*) 23 Ch. D. 525, 52 L. J. Ch. 642, 48 L. T. N. S. 727, 31 W. R. 810.

(*a*) But see *Seton* v. *Satterthwaite*, *post*, p. 334.

Property Act for one subsequent to the Act, the insurance was held subsequent.—In *Holt* v. *Everall* (*b*), a husband, who before the passing of the Married Women's Property Act, 1870, had insured his life and had paid one premium on the insurance, after the passing of the Act gave up the policy and received instead a policy at the same premium for a sum payable to the separate use of his wife if she survived him, and to him if he survived her. He was at the time in embarrassed circumstances, and soon after came under liquidation by arrangement, and then died. His wife had separate estate, subject to a restraint on anticipation, and the Court held that the insurance must be taken as having been effected after the passing of the Married Women's Property Act, and that, whether the subsequent premiums were paid by the husband out of his own [* 332] money or out of *the income of the wife's separate estate, the money payable on the insurance did not go to the trustee under the bankruptcy, but went to the widow by virtue of the Married Women's Property Act. It was further held on the evidence that the premiums were paid out of the wife's separate estate, and that therefore the trustee in bankruptcy would not receive out of the insurance-money the amount of the premiums.

Power of wife to insure under Married Women's Property Act, 1882.—The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) s. 11, provides that "a married woman may by virtue of the power of making contracts hereinbefore contained, effect a policy upon her own life or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly. *Policy by husband for wife and children.*—A policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children or any of them, or by any woman on her own life, expressed to be for the benefit of her husband or of her children, or of her husband or children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trusts remain unperformed, form part of the estate of the insured or be subject to his or her debts. *Intent to defraud creditors.*—Provided that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the assured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid. *Appointment of trustee of policy-money.*—The insured may by the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy. *If no trustee, moneys vest in executors, &c.*—In default of any such appointment of a trustee,

(*b*) *Supra.*

such policy, immediately upon its being effected, shall vest in the *insured and his or her legal personal representatives [* 333] in trust for the purposes aforesaid. *New trustee.*—If at the time of the death of the insured or at any time afterwards there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, and the Acts amending and extending the same. *Receipt.*—The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part."

Surrender of policy.—Having regard to the words in s. 11 of the Married Women's Property Act, 1882, declaring that a policy effected thereunder shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, it would seem that an insurance company could not accept a surrender of such a policy so long as any object of the trust was unperformed.

Effect of policy and Act.—The effect of the policy and the Act taken together is to constitute a declaration of an executed trust, and all the Court has to do is to express its view of the construction of the two instruments taken together.

Per Chitty, J., on Married Women's Property Act, 1882, s. 11.—In the 11th section of the Married Women's Property Act, 1882, the words "separate use" are omitted, probably because the Act has previously made what the Legislature considered sufficient provisions as to the property of a married woman being held for her separate use, and it was considered unnecessary to insert any further provisions in the 11th section. There is another difference between the words of that section and the corresponding part of the 10th section *of the Act of 1870. The new section speaks [* 334] of a policy effected by a man "for the benefit of his wife, or of his children, or of his wife and children or any of them." There it treats the interest of the wife and the interest of the children as two distinct things. That is an indication, though a slight one, that the Legislature never intended the wife and children to take concurrently, but that they should take separate interests; in other words, the wife and children do not take together, or the survivors of them, but the wife is spoken of separately from the children. That, therefore, shows that there is a distinction between the wife and children as regards the interests they are to take (*c*). Considering that the Act of 1882 deals with the subject of policies for the benefit of the wife and children of the insured in almost

(*c*) Per Chitty, J., Re *Adam's Policy Trusts* 23 Ch. D. 529–30, *supra*, p. 330; discussed in *Seton* v. *Satterthwaite*, 34 Ch. D. 511, 35 W. R. 373.

the same terms as the Act of 1870, it would be very desirable for the offices of insurance companies to have a form of settlement for use under the new act of 1882; for this Act, through its being in almost the same terms as the Act of 1870, practically leaves matters much in the same position as they were in under the Act of 1870. *Wife and children joint tenants.*—In a more recent case (*d*) the wife and surviving children were held entitled to the policy-money as joint tenants.

Interest of beneficiaries contingent.—In the Married Women's Property Acts, 1870, 1882, nothing is said as to the power of assignment of a policy by the beneficiaries before the death of a settlor.

It would seem, however, that their interests are all contingent on survival, and that consequently no assignment in the settlor's life would give more than a contingent right to the proceeds of the trust policy (*e*). But it seems that such a policy could be surrendered by the beneficiaries for its surrender value, or exchanged for a *paid up policy (*d*), and the Court might appoint a trustee for the purpose where necessary (*e*).

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The effect of an appointment by a settlor of policy-moneys to his executors and administrators is to make the policies part of the estate of the settlor, subject to the other interests created by the settlement (*f*).

Policy-moneys no part of husband's estate.—The moneys payable under a policy effected by a husband for his wife and children, in conformity with the Married Women's Property Act, 1882, do not belong to his estate, except in the event of the beneficiaries predeceasing him.

The husband has, therefore, it seems, no disposable interest in such policy other than that arising out of the prospect of the predecease of the beneficiaries. In America, to a suggestion that such a provision being voluntary was in the nature of a testamentary disposition and so revocable, the Court said it was no more revocable than a promissory note (*g*).

In Canada it has been held that a policy on the husband's life for the benefit of his wife cannot be claimed by the creditors of either spouse (*h*). As to the wife, this would seem true so long as the interest was only contingent. *Creditors entitled to premiums after husband's insolvency.*—If the husband became insolvent after insuring for the benefit of his wife, it seems that his creditors would be entitled out of the policy-money to the amount of the premiums

(*d*) *Seton* v. *Satterthwaite*, *supra*.

(*e*) See *Connecticut Mutual Life* v. *Burroughs*, 34 Conn. 306, 314. Re *Adam's Policy*, 23 Ch. D. 525, 52 L. J. Ch. 642, 48 L. T. N. S. 727, 31 W. R. 810.

(*d*) Ex parte *Dever*, 18 Q. B. D. 660.

(*e*) *Schultze* v. *Shultze*, 56 L. J. Ch. 356.

(*f*) *M'Kenzie* v. *M'Kenzie*, 21 L. J. Ch. 465, 15 Jur. 1091.

(*g*) *Connecticut Mutual Life* v. *Burroughs*, 34 Conn. at 315.

(*h*) *Vilbon* v. *Marsouin*, 18 Lr. Can. Jur. 249. See *Leonard* v. *Clinton*, 26 Hun. (N. Y.) 288, and Ex parte *Dever*, *supra*.

paid by him subsequent to his insolvency (*i*). *Policy on husband for wife, like specific legacy.*—This form of policy may be likened to a specific legacy made by the husband, conditioned on its being appropriated for the benefit of the wife for her support. But in this country it is not a legacy, but a settlement, and is not liable to duty, not being part of the husband's estate.

**Policy not husband's whilst there is any object of trust.*—The [* 336] moneys payable under a trust policy effected in virtue of the Married Women's Property Acts, 1870, 1882, cannot become part of the husband's estate while any of the objects of the trust continue. Even if there be no trustee, and the husband's executors or administrators are therefore the persons to give the discharge to insurers, such executors or administrators will hold the moneys as trust-moneys, and not as part of the assets of the deceased (*k*).

The trust-moneys, of course, are not exempt from the debts of the beneficiaries named. To the extent of their interest they have the same interest as assigns would have in a sum of money payable on a contingency, and the money is not payable in such a manner as not to be answerable for the debts of the beneficiaries (*l*).

Policy for wife's benefit not to be surrendered by husband.—A man who effects a policy on his own life for his wife's benefit cannot surrender that policy and obtain one on the same terms with new beneficiaries, unless the wife expressly consents that her interest shall be divested (*m*), (*) or unless the wife dies before him.

A ten years' policy for the wife's sole use will not enure to her benefit if the husband survives the ten years, and an alternative endowment is in that case payable (*n*).

Assignment and charge by married woman of her trust policy.—If a married women be induced, without fraud, by her husband to assign or incumber her interest in a policy on his life, she cannot set the transaction aside (*o*), as she can deal with her interest if any (*p*). But settlement of policies on the husband's life to the *wife's separate use does not create a trust for separate use [* 337] till his death, and the wife cannot charge such policies while her husband is living (*q*).

Policy for wife's benefit not actually issued till death of husband belongs to wife.—A husband, who had already effected a policy in favour of his wife (under Married Women's Property Act, 1870), took steps to effect a second similar insurance with the same com-

(*i*) *Central National Bank* v. *Hume*, 51 Am. Rep. 780. Married Women's Property Act, 1882, s. 11.

(*k*) See *Newman* v. *Belsten*, 76 L. T. Journ. 228.

(*l*) *Murray* v. *Wells*, 53 Iowa 256. *Smedley* v. *Felt*, 43 Iowa 607.

(*m*) *Packard* v. *Connecticut Mutual Life*, 9 Missouri (App.) 469 U. S. Digest, 1881, p. 460. *Fortescue* v. *Barnett*, 3 My. & K. 36, 2 L. J. N. S. Ch. 98.

(*n*) *Tennes* v. *North-Western Mutual*, 26 Minn. 271.

(*o*) *Godfrey* v *Wilson*, 70 Ind. 10.

(*p*) *Winter* v. *Easum*, 4 De G. J. & S. 272, 33 L. J. Ch. 665, 10 L. T. N. S. 773, 12 W. R. 1018.

(*q*) *King* v. *Lucas*, 23 Ch. D. 712, 53 L. J. Ch. 102, 31 W. R. 904.

* See note 1 on page 329

pany. The agent to whom he gave his instructions and paid the first premium absconded, and the assured died insolvent before the policy was issued. The written proposals contained no direction to draw the policy in favour of the wife, nor was there any written evidence of the deceased's intention to that effect. The company admitted liability, and prepared a policy dated before the death without reference to the wife. The creditors in an administration action claimed the moneys thereunder, but Pearson, J., held:—

(1) That the policy issued after death must be treated as non-existent at death.

(2) That the only question was the form in which the policy ought to be.

(3) That evidence was admissible of the husband's intention and instructions given by him in that respect (*r*).

(4) That the evidence adduced proved that the policy was intended to be in the wife's favour, and that she therefore was entitled to the moneys as against the creditors.

Married Women's Policies of Assurance (Scotland) Act, 1880.—By 43 & 44 Vict. c. 26, the facilities given by the Married Women's Property Act, 1870, for the benefit of married women and children in England and Ireland are extended to Scotland.

[* 338] *A policy effected by a husband upon his own life for the benefit of his wife under s. 2 of this Act may be surrendered by the trustee, who holds it with the concurrence of the wife; and (per Lord Shand) it may be surrendered without the wife's concurrence, unless the insurance company have notice of any intended breach of trust (*s*).

Life policies assignable without insurer's consent.—With few exceptions, fire policies, unlike life policies, cannot be mortgaged, nor can they be assigned separately from the property to which they relate, or even with it, save by the consent, which cannot be compelled, of the insurer. The person to whom a life policy belongs, however, is entitled, by act *inter vivos* or by will, to make an absolute or conditional disposition of the policy-moneys.

Life policy as security—Life policies may be effected or mortgaged—

(1) As the sole security for a debt or advance.

(2) As a further security, when the principal security for the debt is property in which the mortgagor has a limited or terminable estate.

In the first case, the borrower agrees to effect or to keep up a pre-existing policy upon his own life for the security of the mortgagee. The value of the security increases daily with the nearer approach of the inevitable event upon which the policy is made.

The mortgage of a policy of assurance is similar in its effect to any other mortgage. The mortgagor may redeem the policy; and

(*r*) *Newman* v. *Belsten*, 76 L. T. J. 228, affd. by C. A., 12 Feb. 1884.
(*s*) *Schumann* v. *Scottish Widow's Fund Society*, 13 C. S. C. (4th series) 678, 23 Sc. L. R. 474.

his legal personal representatives, or the assignee of his equity of redemption, are entitled to any surplus proceeds of the policy, after paying to the mortgagee his whole debt, interest, and costs.

Mortgagee can keep up policy.—Such a policy may be kept up by the mortgagee if *the mortgagor fails to do so, and [* 339] the former is entitled without special agreement to add to the amount of his security the premiums paid by him, with interest thereon, on the ground that he is justified in using all proper means for preserving his security (*t*). The premiums advanced and interest would form a charge on the mortgaged policy, but could not be recovered against the mortgagor personally (*u*).

Where the mortgagor of a policy who had become bankrupt continued to pay the premiums, although by the bankruptcy he was relieved from the obligation to do so, it was held (*x*) that the premiums so paid were in the nature of salvage-moneys, and ought, as against the mortgagee, to be repaid with interest out of the policy-moneys; but this decision has been questioned (*y*).

Policies given by way of security not the same as policies taken out by creditor on own account for such purpose.—These mortgaged policies must be carefully distinguished from policies on the life of the debtor effected or kept up by the mortgagee as a collateral security at his own expense and risk without any contract, express or implied, between him and the mortgagor. In such a policy the mortgagor has no interest whatever, and it may be disposed of by the mortgagee just as he likes. It is only a collateral provision made by him for his own benefit. Receipt of the amounts assured thereby would be no discharge to the mortgagor's estate, and he cannot as of right claim any benefit therefrom. On the other hand, the mortgagee, in case of such a policy, cannot make the mortgagor pay the premiums (*z*).

When policy is debtor's.—Where a creditor effects a policy of insurance, either *directly or indirectly at the expense [* 340] of and by arrangement with his debtor, and by way of indemnity to the creator, the policy, on payment of the debt, must be delivered up to the debtor (*a*).

To whom policy effected by grantee of annuity belongs.—This is also the case where the relation of debtor and creditor arises upon the

(*t*) 2 Davidson (4th ed.), pt. 2, p. 63.

(*u*) *Ibid*, note (*s*).

(*x*) *Shearman* v. *British Empire, &c*, *Co.*, 14 Eq. 4, 41 L. J. Ch. 466, 26 L. T. N. S. 570, 20 W. R. 620.

(*y*) *Saunders* v. *Dunman*, 7 Ch. D. 825, 47 L. J. Ch. 388, 38 L. T. N. S. 416, 26 W. R. 397. And see *Falcke* v. *Scottish Imperial*, per Fry, L. J., 34 Ch. D. 234, 35 W. R. 148.

(*z*) *Bruce* v. *Garden*, 5 Ch. App. 33, 39 L. J. Ch. 334, 22 L. T. N. S. 595. 18 W. R. 384. But a declaration that the creditor is interested is desirable if not necessary: *Triston* v. *Hardy*, 14 Beav. 232.

(*a*) *Lea* v. *Hinton*, 24 L. T. 101, 19 Beav. 324, 5 De G. M. & G. 823, *Drysdale* v. *Pigott*, 23 Beav. 238, 8 De G. M. & G. 546, 27 L. T. 310. 4 W. R. 773, 25 L. J. Ch. 878.

grant of a life annuity (*b*), and an insurance has been similarly effected by the grantee to secure the repayment of the money in consideration of which the annuity was granted (*c*).

Where, however, an annuity is granted with a mere option to the grantor of re-purchase or redemption, and an insurance is effected by and in the name of the grantee, but with the money of the grantor, and there is no further evidence of a contract between the parties that the policy should belong to the grantor, it belongs on re-purchase or redemption of the annuity to the grantee (*d*). And where the grantee of an annuity insured the life for which the annuity was granted without there being any stipulation on the subject between him and the grantor, it was held that the latter had no right to have the policy delivered to him (*e*).

Insurance by mortgagee of annuity.—But where a mortgagee of an annuity insured the life of his mortgagor, and wrote to him saying that on redemption of the annuity the policy should be assigned to him, and the mortgagee paid the premiums, on the death of the mortgagor without having redeemed the annuity the mortgagee was held to be entitled to the full benefit of the policy (*f*).

[*341] *Arrears of annuity may be insured like any other debt (*f*).

Creditor insuring, and policy belonging to creditor.—If a creditor insures his debtor's life, and there is no evidence of a contract between the parties on the subject of the policy and the payment of the premiums, the debtor or his representative will have no claim to the policy (*g*). In *Bruce* v. *Garden* the premiums paid were carried to the debit of the debtor's account with his army agent, and he was aware that the policies had been effected; but there was no evidence that the account had ever been shown to him, or that he knew that he was in the account charged with the premiums. Held, reversing the decree of James, V. C., that the army agent was entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representative. *Rule stated, per Hatherley, L. C.*—Hatherley, L. C., said: "There must be distinct evidence of a contract that the creditor has agreed to effect a policy and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor."

Mortgage of policy by debtor to creditor. Debtor's opinion to purchase

(*b*) See *Denman* v. *Scottish Widows' Fund*, 3 Times L. R. 525.
(*c*) *Courtenay* v. *Wright*, 2 Giff. 337, 30 L. J. Ch. 131, 3 L. T. N. S. 433, 9 W. R. 153.
(*d*) *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, 22 L. J. Ch. 912, 17 Jur. 686, 704. *Knox* v. *Turner*, 5 Ch. App. 515, 39 L. J. Ch. 750, 23 L. T. N. S. 227, 18 W. R. 873. *Preston* v. *Neele*, 12 Ch. D. 760, 40 L. T. N. S. 303, 27 W. R. 642.
(*e*) Ex parte *Lancaster*, 4 De G. & Sm. 524.
(*f*) *Bashford* v. *Cann*, 33 Beav. 109, 9 L. T. N. S. 43, 11 W. R. 1037.
(*f*) Ex parte *Day*, 7 Ves. 302.
(*g*) *Bruce* v. *Garden*, L. R. 5 Ch. App. 32, 39 L. J. Ch. 334, 18 W. R. 384, 22 L. T. N. S. 595. *Simpson* v. *Walker*, 2 L. J. N. S. Ch. 55. *Brown* v. *Freeman*, 4 De G. & Sm. 444.

policy from creditor.—Whether a policy belongs to the debtor or the creditor is a question which has arisen where the creditor has himself paid the premium, and it seems that if the policy has been mortgaged by the debtor to the creditor, then, notwithstanding the premiums have been paid by the creditor, it will belong to the debtor; but if the debtor has only an option of purchasing the policy from the creditor on the debt being paid, it will belong to the creditor; and if the debtor die before his option is exercised, the creditor will be entitled to receive the insurance-money for his own use (*h*).

Policy on another's life generally belongs to grantee of policy.—In the absence of contract, express or implied, a *policy effected on the life of another will belong to the person who effects it (*i*). [* 342] *Rule where grantee is debtor.*—But if the policy be taken out in the name of a creditor, and the premiums are paid by the debtor, or he is charged with them in account, the onus lies on the creditor to prove that the policy is his (*k*); and if it is otherwise to be inferred that the insurance was intended as a security *prima facie* the policy will be the property of the debtor, after satisfaction of the debt (*l*). *Grantee of annuity insuring grantor's life.*—If the grantee of an annuity, by way of security, or other mortgagee insures the grantor's life, or if a creditor insures his debtor's life, and pays the premiums out of his own pocket, the policy belongs to the grantee or creditor. The debtor cannot require the creditor to keep up the policy, and the receipt by the grantee or creditor of the insurance-money does not satisfy or discharge the debt (*m*).

Charging debtor with premiums will not per se make policy his.—Charging the debtor with the premiums in his accounts by the creditor will not give the debtor a right to the policy in the absence of evidence that the debtor knew he was so charged, or that he had agreed to pay such premiums (*n*). If, however, upon the insurance by the creditor, it be agreed or can be inferred that the debtor shall be charged with the premiums, and that the policy is effected as a security or indemnity, the policy or the balance of the

(*h*) *Lewis* v. *King*, 44 L. J. Ch. 259, 31 L. T. N. S. 571.

(*i*) *Brown* v. *Freemun*, 4 De G. & Sm. 444. *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, 17 Jur. 704, 22 L. J. Ch. 912. *Freme* v. *Brade*, 2 De G. & J. 582, 6 W. R. 739. *Bashford* v. *Cann*, 33 Beav 109, 9 L. T. N. S. 43, 11 W. R. 1037. *Bruce* v. *Garden*, 5 Ch. App. 32, 18 W. R. 384, 39 L. J. Ch. 334, 22 L. T. N. S. 595. *Knox* v. *Turner*, L. R. 5 Ch. App. 515, 18 W. R. 873, 39 L. J. Ch. 750, 23 L. T. N. S. 227.

(*k*) *Pfleger* v. *Browne*, 28 Beav. 391. *Holland* v. *Smith*, 6 Esp. 11. *Morland* v. *Isaac*, 20 Beav. 389. *Drysdale* v. *Pigott*, 8 De G. M. & G. 546, 25 L. J. Ch. 878, 27 L. T. 310, 4 W. R. 773.

(*l*) *Williams* v. *Atkyns*, 2 Jo & Lat (Ir.) 603. *Hawkins* v. *Woodgate*, 7 Beav. 565. *Lea* v. *Hinton*, 5 De G. M. & G. 823, 24 L. T. 101. Ex parte *Andrews*, 2 Rose 410, 1 Madd. 573. *Lewis* v. *King*, *supra*.

(*m*) *Gottlieb* v. *Cranch*, *supra*. *Williams* v. *Atkyns*, *supra*. *Humphreys* v. *Arabin*, Ll. & Goold (Plunkett) 318. Ex parte *Lancaster*, 4 De G. & Sm. 524.

(*n*) *Bruce* v. *Garden*, L. R. 5 Ch. 32, *supra*, note (*i*).

[* 343] *insurance money after discharge of the debt will be the debtor's, and it will be immaterial in such a case that the premiums were not actually paid by the debtor, if he has been charged with them in account by the creditor, and has not disputed his liability to pay them (*o*).

Payment of premiums by mortgagee will not deprive mortgagor of policy.—As the mere non-payment by the mortgagor of a charge attributable to the mortgaged property cannot have the effect of foreclosure, the payment of the mortgagee of the premiums on the mortgagor's refusal will not divest the right of the latter to the policy after repayment by him of the advances with interest (*p*). The circumstance that an allowance for insurance was included in the calculation of the consideration will not entitle the debtor to a policy kept up by the creditor, if there were no stipulation by the debtor for an insurance. The matter is then at the option of the creditor, who, whether he effects an insurance, or by retaining the money becomes his own insurer, is equally entitled to the benefit of the arrangement (*q*).

Where creditor placed in position of trustee, he must account for policy money after deducting premiums.—If by the terms of the security itself the creditor be placed in the position of a trustee, as if the security be assigned to him upon trust, after payment of costs, to retain the debt and pay over the surplus, he must account for the insurance-money after deducting the premiums, being within the principle which forbids dealing by a trustee with the trust estate for his own benefit (*r*).

[* 344] *An agreement may be expressed or inferred, under which the debtor shall take the benefit of the insurance. *What is evidence that policy should be re-assigned with principal security on redemption.*—Thus an agreement (*s*) that, if redemption shall take place after the premiums shall have been paid for the current year, the mortgagor shall repay to the mortgagee such proportion of that premium as shall belong to the then unexpired part of the current year, has been held to be sufficient evidence of an intention that the policy should be assigned with the principal security upon redemption, even without regard to subsequent words importing yet more clearly a right in the mortgagor to require an assignment of

(*o*) *Holland* v. *Smith*, 6 Esp. 11. *Morland* v. *Isaac*, 20 Beav. 389. *Brown* v. *Freeman*, 4 De G. & Sm. 444. *Henson* v. *Blackwell*, 4 Hare 434, 14 L. J. Ch. 329, 9 Jur. 390. Re *Storie's Trusts*, 1 Giff. 94, 5 Jur. N. S. 1153, 28 L. J. Ch. 888, 34 L. T. 20. *Courtney* v. *Wright*, 30 L. J. Ch. 131, 3 L. T. N. S. 433, 2 Giff. 337, 9 W. R. 153. *Lea* v. *Hinton*, 24 L. T. 101, 5 De G. M. & G. 823. *Freme* v *Brade*, 2 De G. & J. 589, 6 W. R. 739, 4 Jur. N. S. 746, Fisher on Mortgages 974 (4th ed.)

(*p*) *Drysdale* v. *Pigott*, 8 De G. M. & G. 546, 22 Beav. 288, 25 L. J. Ch. 878, 5 W. R. 778, 22 L. T. 193.

(*q*) *Freme* v. *Brade*, *supra*.

(*r*) Ex parte *Andrews*, Re *Emmett*, 2 Rose 410, 1 Madd. 573, Fisher on Mortgages 975 (4th ed.).

(*s*) *Williams* v. *Atkyns*, 2 Jo. & Lat. (Ir.) 603.

the policy. But the passing of letters between the parties which refer to the necessity for the insurance, or a provision in the principal security for payment by the debtor of the additional premiums which in certain events might become payable upon the policy, or a covenant by the *cestui que vie* of the annuity to do the necessity acts for the effecting of the insurance, are not sufficient (*t*) to give the mortgagor or grantor of the annuity a title to the policy, for these are only statements of or references to the terms upon which the transaction was affected, and afford no evidence of a contract which will take the case out of the general rule. *Letters as evidence of right to policy.*—It seems that letters which have passed between the parties may be looked at in order to ascertain whether there were any contract concerning the right to the policy, where there is no discrepancy between the letters and the security (*u*), though it would be otherwise if the effect of the letters would be to vary the stipulations of the security (*x*).

Contract that policy shall be re-assigned.—Where there is an express contract that the policy shall be re-assigned upon the security being redeemed, *if the grantor shall elect to take it, [* 345] the grantee may not, either before or after election, part with the policy for his own benefit (*y*).

Position of creditor with surety for debt, insuring debtor's life.—Where a creditor whose debt is secured by sureties insures the life of the principal debtor, he is perfectly free to assign over such policies to the debtor or any one or more of the sureties paying the principal debt. *Position of sureties inter se.*—But as between the sureties no one of them can by paying the debt, and obtaining such assignment, appropriate the whole benefit of the policy, and claim contribution from his co-sureties as though such policy never existed. To give him such a right, the others must abandon or disclaim all benefit of the policy (*z*).

Surety can deduct sums spent in keeping up policy.—But the surety who takes over the policy is entitled in an action for contribution to deduct from the amount received on the policy all sums spent by him in keeping it up, since, as the benefit is joint, the burden must be so also (*a*).

Creditor within rule that trustee may not make profit.—Where a contingent interest was assigned upon trust to secure a debt, and the creditor insured against the contingency and received the insurance, he was held to be within the principle which prohibits a trustee from making an advantage out of his trust; and, the debtor being bankrupt, the creditor was permitted to prove only for the

(*t*) *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, 22 L. J. Ch. 912, 17 Jur. 704, Fisher on Mortgages 976 (4th ed.).

(*u*) *Gottlieb* v *Cranch*, *supra*.

(*x*) *Squire* v. *Campbell*, 1 Myl. & C. 458, Fisher on Mortgages 977 (4th ed.).

(*y*) *Hawkins* v. *Woodgate*, 7 Beav. 565, 8 Jur. 743.

(*z*) *Atkins* v. *Arcedeckne*, 24 Ch. D. 709, 53 L. J. Ch. 64, 48 L. T. N. S. 725.

(*a*) *Ibid.*

balance of the debt (*b*). *Life policy is "property."*—A mortgage of a life policy is a mortgage of "property" so as to require an *ad val.* stamp (*c*). *Succession duty not payable.*—A life policy does not create the relation of predecessor and successor between the insurers and the assured, or any assignee of the assured, so as to attract succession duty (*d*).

[* 346] **Policy as collateral security, mortgagor's interest being defeasible.*—In the second class of mortgages of life policies come tenants for their own or other lives, annuitants, or persons with a defeasible interest in mortgaged property. In such cases, according to the tenure of the mortgagor, insurance is made either on his own life or on the life upon the duration of which his interest depends. And such insurance is a further security to the mortgagee in case the tenant for life dies without paying the mortgage-money, or the tenant for life loses his estate by the death of the *cestui que vie.*

The mortgagee may make such an insurance a condition precedent to lending, and there is no objection to such a policy being effected in the name of the mortgagor; but the mortgagee should be careful to ascertain that the mortgagor has an actual and insurable interest in the life insured at the time the policy was effected.

Court cannot compel insurance for the purpose of perfecting security.—But he is under no obligation independently of contract to effect such an insurance, and the High Court of Justice has no more power than had the Court of Chancery when directing money to be raised upon estates of the kind now in question to compel persons who have an insurable interest in the lives upon which such estates depend to effect policies on such lives as part of the security for the money directed to be raised (*e*), nor can a bankrupt be obliged to insure himself or be examined with a view to insurance (*f*).

Mortgagee can add premiums to security.—In such mortgages it is usual, if not invariable, for the mortgagor to covenant to pay the premiums. If he fails to do so, the mortgagee can pay them, and add them to his security. If the policy be let drop, or none be effected or stipulated for, the mortgagee clearly has an insurable interest in an event which may terminate his security such as to enable him to insure the life of the tenant for life or *cestui que*

[* 347] *vie.* If he does so, the *insured is wholly his own, and the mortgagor has no claim on it (*f*).

(*b*) Ex parte *Andrews*, 2 Rose 410, 1 Madd. 573.
(*c*) *Caldwell* v. *Dawson*, 5 Ex. 1, 14 Jur. 316.
(*d*) 16 & 17 Vict. c. 51, s. 17.
(*e*) *Grantley* v. *Garthwaite*, 6 Madd. 96 Fisher on Mortgages (4th ed.) 13.
(*f*) Ex parte *Bullock*, 16 Q. B. D. 698. Re *Betts*, Times L. R. 598.
(*f*) *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, 17 Jur. 704, 22 L. J. Ch. 912. *Williams* v. *Atkyns*, 2 Jo. & Lat. (Ir.) 603. *Bashford* v. *Cann*, 33 Beav. 109, 9 L. T. N. S. 43, 11 W. R. 1037. *Humphrey* v. *Arabin*, Ll. & Goold (*temp.* Plunkett) 218. Ex parte *Lancaster*, 4 De G. & Sm. 524 See also *Knox* v. *Turner*, 5 Ch. App. 515, 39 L. J. Ch. 760, 23 L. T. N. S. 227, 18 W. R. 873.

Power of sale on breach of covenant to insure. Power to appoint receiver.—By s. 19 of the Conveyancing Act, 1881, a power of sale is made an incident of all statutory mortgages in the absence of any contrary, varying, or limiting stipulation. And by s. 20 (iii.) thereof such power of sale will arise on breach of a covenant to keep on foot a life policy or policies as a collateral security to the mortgagee of the life interest (*g*), and the power to appoint a receiver given by s. 24, where the power of sale has arisen, enables a mortgagee to appoint such receiver and authorize him in writing, sub-s. 8 (iii.), to employ the moneys received by him, after satisfying certain prior outgoings, in paying the premiums upon life, fire, or other policies properly payable under the mortgage deed.

How proceeds of policy applicable.—By s. 22 (2) the proceeds of a life policy, which is a security within the mortgage deed, are to be applied as money arising from a sale of mortgaged property (*h*).

Policy is "property."—A life policy is property within the meaning of s. 19 (1), see s. 2 (1), and the power of sale consequently applies to that also, as well as to any realty or chattels within a mortgage deed. So that the mortgagee can sell and assign (*i*) a life policy if the mortgagor does not comply with the terms of the mortgage deed. He can also forclose (*k*).

Mortgage upon trust: mortgagee cannot sell.—In *Dyson* v. *Morris* (*l*) it was held by Wigram, V. C., that although on a simple mortgage of a policy of *assurance the mortgagee, in default [* 348] of payment, is entitled to a sale under the decree of a Court of Equity, yet if the policy have been assigned to the mortgagee upon trust to receive the money to become payable, and thereout to pay the expenses and mortgage debt, and pay the residue to the mortgagor, the Court cannot direct a sale of the policy. The mortgagee must wait until the death of the mortgagor before he can make his security available.

Covenant to keep up policy. Breach. Damages.—Where a policy of life assurance is mortgaged, and the mortgagor covenants to keep up and restore the policy, and breaks his covenant, the mortgagee has an action for damages, and the measure of damage is:—

(i.) The amount of premiums, if any, paid by the mortgagee to keep up the policy and interest thereon.

(ii.) The amount necessary to renew the policy, if it has dropped in consequence of the mortgagor's default (*m*).

(*g*) Wolstenholme & Turner's Conv Act (3rd ed.) p. 66.

(*h*) See *Boswell* v. *Coaks*, 23 Ch. D. 302.

(*i*) But see *Drysdale* v. *Pigott*, 8 De G. M. & G. 546, 22 Beav. 238, 25 L. J. Ch. 878, 27 L T. 310, 4 W. R. 773, 2 Jur. N. S. 1078.

(*k*) *Parker* v. *Marquis of Anglesey*, 20 W. R. 162, 25 L. T. N. S. 482. *Kingsford* v. *Swinford*, 7 W. R 663.

(*l*) 1 Hare 413.

(*m*) 2 Dav. Conv. pt. 2, 63, and cases there cited. Fisher on Mortgages 451 (4th ed.)

(iii.) In case of a loss, the amount of the loss (not exceeding the mortgage debt) (*n*).

Where the covenantor commits suicide, the policy being on his own life and in trust, the trustees cannot recover damages from his general estate under such covenant (*o*).

Covenant to repay premiums. Damages for breach.—Where the mortgage deed contains a covenant by the mortgagor to repay any premiums paid by the mortgagee, the latter has his remedy, either on that covenant for the amount so paid by him, or on the covenant to keep up the policy, in which latter case the measure of damages would be just the same where no loss had happened.

[*349] **Covenant to keep up policy and power to add premiums to debt.*—Where the mortgage contains a covenant by the mortgagor to keep up the policy, but no covenant by him to repay to the mortgagee any premiums spent by him, but a power to pay and add to the mortgage debt, only nominal damages will be given in an action for breach of the covenant (*p*), as the deed itself provides a remedy for the breach by adding the sums paid to the mortgage debt.

Mortgage to company, premiums "just allowances."—Where a policy has been mortgaged to the insurers, and the mortgagor has agreed but failed to pay the premiums, they will, on taking the accounts, be treated as just allowances to the insurers as mortgagees (*q*), if they have kept alive the insurance, but not otherwise (*r*). If allowed, they will be added to and bear interest at the same rate as the principal debt.

Mortgagee cannot add premiums unless express contract. Except under Conveyancing Act, 1881.—A mortgagee could not insure and add the premiums to the mortgage debt in the absence of an express contract authorizing him to do so (*s*). This, however, is varied by 44 & 45 Vict. c. 41, s. 19 (ii.), under which a mortgagee may insure against loss by fire, and the premiums will be a charge on the property.

Executor should keep up policy.—An executor who dropped a policy on the life of a debtor to the testator's estate without consulting those benefically interested has been held liable for the whole sum which would have been received if he had kept up the policy (*t*).

Breach of covenant by going out of Europe. Damages.—Where a deed by which the defendant assigned to the policy on his own life contained a covenant that he would not do anything to

(*n*) Mayne on Damages 241 (8rd ed.).
(*o*) *Dormay* v. *Borrodaile*, 10 Beav. 335, per Lord Langdale.
(*p*) *Brown* v. *Price*, 4 Jur. N. S. 882, 6 W. R. 721, Fisher, p. 351 (4th ed).
(*q*) *Fitz William* v. *Price*, 4 Jur. N. S. 889, 31 L. T. 389. *Brown* v. *Price*, *supra*.
(*r*) *Gray* v. *Ellison*, 1 Giff. 438, Fisher, p. 361 (4th ed.) 2 Jur. N. S. 511, 25 L. J. Ch. 666, 4 W. R. 497, 27 L. T. 165.
(*s*) *Brooke* v. *Stone*, 34 L. J. Ch. 25, 12 L. T. N. S. 114, 13 W. R. 401.
(*t*) *Garner* v. *Moore*, 3 Drew, 277, 24 L. J. Ch. 687.

forfeit the policy, and a forfeiture accrued through the *de- [* 350] fendant's going beyond the limits of Europe without the license of the company, the damages were assessed upon the present value of the policy, to be calculated by an actuary, taking into consideration that the defendant covenanted to pay and should pay premiums on the policy (*u*).

What a mortgage of life policy should contain.—Where a policy of life assurance is mortgaged, the mortgage deed should contain:—

(i.) A covenant to keep up the policy.

(ii.) A covenant to restore it if it lapses.

(iii.) An authority to the mortgagee to keep up or restore the insurance, in case of default by the mortgagor, and to recover the money so expended, or to add premiums to the mortgage debt.

Money advanced for keeping up a mortgaged policy or effecting a new policy in lieu thereof is exempted from the *ad valorem* stamp duty by the Stamp Act, 1870 (*v*), s. 107.

(*u*) *Hawkins* v. *Coulthurst*, 5 B. & S. 343, 33 L. J. Q. B. 192, 12 W. R. 825.
(*v*) 33 & 34 Vict. c. 97.

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*CHAPTER XVIII.

LIEN.

Policies. Lien. Leslie v. French.—Besides rights to or in policies accruing to persons (other than the person taking out the same) by way of assignment or charge, numerous questions arise as to lien on policies. In a very recent case, *Leslie* v. *French* (*a*), the law as to one branch of this subject has been summed up and digested by Fry, L. J., who said as follows:—

Lien may arise by paying premiums.—"A lien may be created upon the moneys secured by a policy by payment of premiums in the following cases:—

Contract with owner.—"1. By contract with the beneficial owner of the policy (1).

By virtue of trusteeship.—"2. By reason of the right of the trustees to an indemnity out of the trust property for money expended by them in its preservation.

By subrogation.—"3. By subrogation to the rights of the trustees of some person who may have advanced money at their request for the preservation of the property.

By right of incumbrancers to preserve security.—"4. By reason of the right vested in mortgagees or other persons having a charge upon the policy to add to that charge any moneys which have been paid by them to preserve the policy."

Example of lien by contract.—An instance of the first class of cases, viz., the creation of a lien by contract with the beneficial [* 352] owner *is to be found in the case of *Aylwin* v. *Witty* (*b*), where Kindersley, V. C., held "that where a mortgagor had contracted with the mortgagee to pay the premiums, and there were sureties for the performance of this contract by the mortgagor, and the sureties had been called upon and had paid the premiums, they were entitled as against the mortgagor to a lien upon the policy-moneys. It is obvious that in this case the sureties were, by contract with the principal debtor, entitled to the benefit of all the securities which the mortgagee could have enforced, and

(*a*) 23 Ch. D. 552, 52 L. J. Ch. 762, 48 L. T. N. S. 564, 31 W. R. 561, confirmed by *Falcke* v. *Scottish Imperial*, 34 Ch. D. 234, 35 W. R. 143.

(*b*) 9 W. R. 720, 30 L. J. Ch. 860.

[1] Premiums voluntarily paid on life of another cannot, in absence of any understanding, be recovered of the beneficiary, and person so paying has no lien for such payments upon the proceeds of insurance collected by him as agent of such beneficiary. *Meier* v. *Meier*, 88 Mo. 566.

amongst others to a charge for the premiums paid. *Examples of lien by virtue of trusteeship and by subrogation.*—The second and third classes of cases are well illustrated by *Clack* v. *Holland* (*c*), in which it was held that trustees who paid moneys under circumstances which gave them no right to a charge could not create a charge in favour of a third person from whom they borrowed moneys. To the same class may be referred the case of *Gill* v. *Downing* (*d*), in which mortgages, whose title as such was good after, and only after, the death of the tenant for life, were held entitled to a lien during the subsistence of the tenancy for life. The mortgagees were put by subrogation in the place of the trustees. Again, in the case of *Tbdd* v. *Morehouse* (*e*) the right of trustees to create a lien by subrogation of their rights was recognized, and it was determined that a person paying at the request of the trustees did not lose the right to the lien simply because the trustees might possibly have taken some other course to preserve the property." His lordship continued: "Such appear to me to be the classes of cases in which a lien is created by payment of premiums. I am further of opinion that, except under the circumstances to which I have referred, no lien is created by the payment of the premiums by a mere stranger or by a part *owner. *Payment of premiums by mere* [* 353] *stranger gives no lien.*—I will first consider the case of payments by a mere stranger. On principle it is difficult, if not impossible, to see why such payments, which when made without contract or request are a mere impertinence, should create a lien upon the property. It is evident that in themselves they would not even create a ground of personal action against the person eased by the payment of moneys by A. for B. gives no ground of action against B., unless they are paid on his request. Further, the law relating to 'confusion' appears strongly to show that no such right would exist. If I pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into your granary, I have no right to an account or any relief against you, but, on the contrary, I have actually transferred the property in what was mine to the person with whose property I have mingled it. Again, the authorities seem to me to be very clear upon this point. In the case of *Burridge* v. *Row* (*f*), Knight Bruce, L J., used the following language:—'Nothing that has been stated to me has had the effect of persuading me that without contract for that purpose the mere fact of making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property. A mere stranger by paying the premiums on a policy cannot acquire a lien on it. He can only acquire a lien by

(*c*) 19 Beav. 262, 2 W. R. 402, 18 Jur. 1007, 24 L. J. Ch. 13.
(*d*) 17 Eq. 316, 30 L. T. N. S 157, 22 W. R. 360.
(*e*) L. R. 19 Eq. 69, 23 W. R. 155, 32 L. T. N. S. 8.
(*f*) *Burridge* v. *Row*, 1 Y. & C. Ch. C. 183, 191, 583, 13 L. J. Ch. 173, 8 Jur. 299.

some contract with the persons beneficially interested in it, or with the trustee, where the trustee himself might have obtained a lien.'"

Payment of premiums by part owner per se gives no lien.—The learned Lord Justice Fry further said in the same case (*Leslie* v. *French*)—"With regard to payments made by a part owner, it appears to me that except by contract such payments give no title to the person making them against the other part-owners [* 354] of the *policy. *Payments by mortgagor.*—That payments by a mortgagor who in equity is part owner with the mortgagee create no lien as against the mortagee was determined by Romilly, M.R. (*g*). *By tenant for life.*—And generally speaking, it is clear that money laid out by the tenant for life in improvements on the estate creates no lien against the remainder-man (*h*). *Under voidable assignment.*—Again, in *Pennell* v. *Millar* (*i*), the Master of the Rolls had to deal with a case in which A., the owner of policies, had as a part of a transaction avoidable for fraud assigned them to B., and had covenanted to keep them up. B., claiming under the assignment, had paid premiums. A. instituted a suit to set aside the transaction on the ground of fraud, and the Master of the Rolls decided the assignment was a valid security for the moneys actually advanced, and not for the premiums paid by B., which was a voluntary payment.

In this case it is evident that until the transaction was avoided, A. and B. both had interests in the policies, and yet the payment by one of the persons so interested was held to create no lien as against the other.

Right of contribution gives no lien.—The law of contribution does not apply, for (1) it arises only between persons joined for a common purpose, or who stand in the position of tenants in common or co-parceners.

(2) The right to contribution is a personal right, and the remedy personal, and there is no lien for the amount of the [* 355] moneys in respect of which the right *arises. This was decided by Lord Eldon in *ex parte Young* (*k*), overruling Lord Hardwicke.

No lien on policy where premiums paid by tenant for life.—Where the tenant for life under a settlement of a residuary estate, which comprised an annuity, and a policy on the life for which the annuity was held, paid premiums on the policy which the trustees had power to retain in specie and keep up, she was decided to have no lien on the policy for such payments, since the policy was kept up

(*g*) *Norris* v. *Caledonian Ins. Co.*, 8 Eq. 127, 132, 20 L. T. N. S. 939, 17 W. R. 954.

(*h*) Tenants improving under the Settled Land Act, 1882, must insure for the benefit of the remainderman. See *Waugh's Trusts*, 46 L. J. Ch 629, 25 W. R. 555.

(*i*) 23 Beav. 172, 5 W. R. 215, 29 L. T. 35. See *Darcy* v. *Croft*, 9 Ir. Ch. 19 (1858).

(*k*) 2 V. & B. 242.

for the benefit of the estate (*l*). It should be observed that the trustees had power to retain enough out of the income to pay the premiums on the policy, and the Court considered that they might be taken to have done so, which would only have diminished the actual income of the tenant for life equally with the payments she herself made.

Lien upon a policy may arise in other ways than by payment of premiums under the circumstances before stated.

Lien by deposit of policy.—Although mere deposit of a policy upon an advance of money, without notice to the insurance office of the deposit, will not suffice to constitute an equitable mortgage of the policy, it may create a lien thereupon, if such be the intention of the parties, even though not a word passed at the time the deposit was made (*m*).

Further advances covered.—And an equitable charge may be created by mere deposit, accompanied by notice to the office (*n*), and as the Court would infer from that deposit that the money then advanced should be charged as if there was *a [* 356] written agreement, additional advances would also be so charged unless a contrary intention appeared (*o*).

Lien by persons commissioned to effect a policy.—Insurance brokers have a general lien on the marine policies effected by them, for the general balance due to them from their principals (*p*). This rule applies to land policies when effected through such brokers, but depends on the custom of a particular calling. Even with them no lien can be claimed if the policy has been deposited with them for a special purpose (*q*). If one broker is employed by another broker to effect a policy for that other's principal, the sub-agent has still a lien on the policy for premiums due from the broker who employed him (*r*).

Solicitor's lien.—A solicitor may have a lien on a policy of insurance for his costs. Such lien is only a passive remedy, giving no claim to the fund secured by the policy, but merely a right to embarrass the person who claims the fund by the non-production of the documents of title. A solicitor is not bound to give the insurance office any notice of his lien, since owing to the nature thereof

(*l*) *Waugh's Trusts*, 46 L. J. Ch. 629, 25 W. R. 555. *Browne* v. *Browne*, 8 W. R. 726. See also *Money* v. *Gibbs*, 1 Dr. & Wal. (Ir.) 394.

(*m*) *Gibson* v. *Overbury*, 7 M & W. 555, 10 L. J. N. S. Ex. 219. *Chapman* v. *Chapman*, 13 Beav. 311, distinguished in *Maughan* v. *Ridley*, 8 L. T. N. S. 309. *Rummens* v. *Hare*, 1 Ex. D. 169, 34 L. T. N. S. 407, 24 W. R. 385. *Green* v. *Ingham*, L. R. 2 C P 525. See *Conway* v. *Britannia*, 8 Lr. Can. Jur. 162.

(*n*) Ex parte *Kensington*, 2 V. & B. 83, per Eldon, C. (1878). *Ferris* v. *Mullins*, 2 Sm. & Giff. 378, 18 Jur. 718.

(*o*) Ex parte *Langstone*, 17 Ves. 227, per Eldon, C. (1810). See *Ellis* v. *Kreutzinger*, 27 Missouri 311. *Talbot* v. *Frere*, 9 Ch. D. 568, 572, 27 W. R. 148.

(*p*) See Cross on Lien, and cases there cited, 277, 399. *Castling* v. *Aubert*, 2 East 325 (1802).

(*q*) *Muir* v. *Fleming*, 1 Dowl. & Ry. N. P. 29.

(*r*) *Dixon* v. *Stansfield*, 10 C. B. 398. *Fisher* v. *Smith*, 4 App. Cas. 1, 48 L. J. Q. B. 411, 39 L. T. N. S. 430, 27 W. R. 118.

he would not by such notice convert the insurers into trustees for him, and failure to give such notice is in no way such negligence as to deprive him of his lien (*s*). He cannot be made to part with the policy till he is paid, except upon terms (*l*), such as [* 357] payment into court of the policy moneys, or preservation *of the lien by the insurers. But it is doubtful whether such a lien could be enforced by suit at all (*u*).

Right to stop in transitu gives no right to insurance.—Lien in vendor and right to stop *in transitu* do not entitle the vendor to the proceeds of policies effected by the purchaser on the goods sold (*x*).

Vendor's lien subrogated to insurers.—When an unpaid vendor who is insured recovers from the insurers, the insurers are entitled to his lien as against the purchaser, and if the vendor recover from the purchaser too, he must refund the insurance (*y*).

Lien created by deposit by person out of jurisdiction with one within.—Where a policy granted to a person domiciled outside the jurisdiction is deposited with a person within the jurisdiction to answer a debt by a contract made within the jurisdiction, a lien thereon will be acquired by the depositee, and will not be affected by the bankruptcy in his own domicile of the depositor (*z*).

Creditor having two debts secured by policy surety of one debt cannot claim the policy after payment. Lien drops with policy.—Where a creditor has his debt secured by a policy and guaranteed by a surety, and also has a lien on the policy for another debt, the surety is not entitled to the policy on paying the debt, but his rights are subject to the lien (*a*).

When a policy drops, the lien drops with it (*b*).

Lien by mortgagor paying premiums.—If a mortgagor after bankruptcy pays premiums to keep up a mortgaged policy, he is not entitled, in the absence of special agreement, to a lien on the policy for the amount so paid (*c*).

(*s*) *West of England* v *Batchelor*, 30 W. R. 864, 51 L. J. Ch. 199, 46 L. T. N. S. 132. *Pelly* v. *Wathen*, 1 De G. M. & G. 16. *Richards* v. *Platel*, Craig & Ph. 79. *Steadman* v. *Webb*, 3 My. & Cr. 346. See *Dearle* v. *Hall*, 3 Russ. 1, for rules as to priority in regard to choses in action.

(*t*) *Richards* v. *Platel*, Cr. & Ph. 79 at 84, per Cottenham, C. *Limerick Co.* v. *O'Ferrall*, 1 Ir. Jur. 93.

(*u*) *Stedman* v. *Webb*, 4 My. & Cr. 346, per Cottenham, C. (1839).

(*x*) *Berndton* v. *Strang*, 3 Ch. App. 588 16 W. R. 1025, per Cairns, C. (1868), distinguishing *Worrall* v. *Johnson*, 2 Jac. & W. 214.

(*y*) *Castellain* v *Preston*, 11 Q. B. D. 380, 52, L. J Q. B. 366, 49 L. T. N. S. 29, 31 W. R. 557, per Bowen, L. J.

(*z*) *Le Feuvre* v. *Sullivan*, 10 Moore P. C. 1.

(*a*) *Fairbrother* v. *Woodhouse*, 28 L. T. 94, 5 W. R. 12, 23 Beav. 18, 26 L. J. Ch. 81. *Jeffrey's Policy*, 20 W. R. 857.

(*b*) *Busteed* v. *Western England*, 5 Ir. Ch. 553. *Norris* v. *Caledonian Ins. Co*, 8 Eq. 132. 20 L. T. N. S. 929, 17 W. R. 954.

(*c*) *Saunders* v. *Dunman*, 7 Ch. D. 825, 47 L. J. Ch. 338, 38 L. T. N. S. 416, 26 W. R. 397. *Falcke* v. *Scottish Imperial*, 34 Ch. D. 234. These cases explain *Shearman* v. *British Empire Mutual*, L. R. 14 Eq. 4, 41 L. J. Ch. 466, 26 L. T. N. S. 570, 20 W. R. 620.

CHAPTER XIX. [358]

CONFLICTING CLAIMS.

When company should interplead and not pay into court, under 10 & 11 Vict. c. 96.—When conflicting claims are made on an insurance company in respect of a policy, the proper procedure is to interplead (*a*), and not to pay into court under the Trustees' Relief Act (*b*), the insurers not being trustees or stakeholders, but debtors.

The practice of paying into court under that Act had been often used (*c*), until Jessel, M.R., pointed out that unless the policy was a trust policy the Act did not apply.

The insurers cannot interplead if they have any adverse claim in respect of the subject-matter (*d*). In Ireland it has been held that they cannot interplead if one claimant offers a sufficient indemnity, and that if he offers indemnity and they are not satisfied, they should pay into court under the Trustees' Relief Act (*e*).

When an action is commenced by a claimant on a policy, if it is not so framed as to bring the other claimants before the Court, the insurers may interplead, and have the first action stayed (*f*).

An offer should be made to pay interest on the policy moneys (*g*), since a policy bears interest under *3 & 4 Wm. [*359] IV. c. 42, s. 28 (*h*), for it would seem that submission to pay the moneys to the persons found to be entitled will not remove the obligation to pay interest even if conflicting claims through no fault of the insurers delay such payment (*i*), unless any arrangement has been come to that the money should not be invested or brought into court (*k*).

Payment under decree indemnifies company.—If the insurance com-

(*a*) See *Prudential* v. *Thomas*, 8 Ch. App. 74, 37 L. J. C. H. 202, 16 W. R. 470.

(*b*) *Haycock's Policy*, 1 Ch. D. 611, 45 L. J. Ch. 247, 24 W. R. 291, disapproving the *United Kingdom Life*, 34 Beav. 493, 13 W. R. 645.

(*c*) *Chapman* v. *Barnard*, 17 W. R. 359. *Webb's Policy*, 2 Eq. 456, 15 W. R. 529. *Cobb's Policy*, 15 W. R. 29.

(*d*) *Bignold* v. *Audland*, 11 Sim. 23, 30 (1840), per Shadwell, V. C.

(*e*) *Chapman* v. *Besnard*, 17 W. R. 359 (1869), per Lord O'Hagan.

(*f*) *Prudential Co.* v. *Thomas*, *supra*.

(*g*) *Bignold* v. *Audland*, *supra*.

(*h*) *Bushnan* v. *Morgan*, 5 Sim. 635 (1833).

(*i*) *French* v. *Royal Exchange Co*, 6 Ir. Ch. 523

(*k*) Same case on appeal, 7 Ir. Ch. 523 (1858).

pany pay under decree moneys payable under a lost policy, such decree is sufficient indemnity (*l*).

Payment to trustees good.—The insurance can safely pay a trustee of a policy even if under the trust he has no express power to give receipts (*m*).

Can policy be taken in execution?—The authorities conflict as to whether a policy can be taken in execution under a *fi. fa.* In Ireland it has been held that a policy of life insurance is not such a security for money as can be taken by the sheriff (*n*). In England the contrary has been held (*o*); but the Irish case was not cited to the Court, and in the latest case in Ireland (*p*), the Court fully discussed both authorities, and followed the previous Irish decision. Canadian policies usually provide that a fire insurance shall cease on the property being taken in execution.

(*l*) *England* v. *Tredegar*, 1 Eq 344, 35 Beav. 256, 35 L. J. Ch. 386, following *Crokatt* v. *Ford*, 25 L. J. Ch. 552, 4 W. R. 426, 2 Jur. N. S. 436, in preference to *Bushnan* v. *Morgan*, *supra*.

(*m*) *Fernie* v. *Maguire*, 6 Ir. Eq. 137. *Ford* v. *Ryan*, 4 Ir. Ch. 342.

(*n*) *Alleyne* v. *Darcey*, 5 Ir. Ch. 56 (1855).

(*o*) *Stokoe* v. *Cowan*, 29 Beav. 637, 30 L. J. Ch. 882, 4 L. T. N. S. 695, 9 W. R. 801.

(*p*) *Sargeant's* v. *Trusts*, 7 L. R. Ir. 66.

CHAPTER XX. [360]

COMPANIES.

What depends on manner of company's constitution.—The mode in which an insurance company is constituted determines the manner in which it shall sue and be sued, and the character of the liability of its members. But whenever be the means by which such company is constituted, its powers and liabilities, and the method of its management, are peculiar to itself, and are determined by the particular provisions of the statute, charter, or other instruments under which the company is created. These provisions are important to shareholders, policy-holders, and all other persons having dealings with the company; because by the registration now necessary under the Companies Act, 1862, all persons are deemed to have notice of them.

Classification.—Insurance offices may be classified irrespectively of the manner or nature of their constitution as follows:—

Proprietary.—1. Proprietary offices which are joint-stock partnerships, with a subscribed or guaranteed capital, the partners wherein absorb the whole profits of the undertaking.

Mixed, in which policy-holders share profits.—2. Offices set up for profit to the shareholders, but which also give the policy-holders certain advantages in the way of a share of the profits, usually called a bonus or a periodical rebate in the amount of their premiums; but they do not admit the policy-holders as partners, nor render them liable has such.

These mixed companies are the most common; in fact the late Lord Justice James said: "Every life assurance *society [* 361] is substantially and materially a mutual life assurance society. The method by which it is intended to provide for the payment of the sums secured by the policies is by investing the premiums and accumulating the money so as to form a fund out of which the claims are ultimately to be satisfied. The capital of the shareholders and the sums which the shareholders undertake and make themselves liable to pay, are in truth only a guarantee against the possible contingency of the accumulated insurance fund being found insufficient" (*a*).

Mutual.—3. Offices established for mutual insurance, where the policy-holders are themselves the proprietors, and where the principal object of the society is rather the protection of its members against loss than the acquisition of profit. It was there-

(*a*) *Gram's Case*, 1 Ch. D. 321, 45 L. J. Ch. 321, 33 L. T. N. S. 706.

fore doubted whether such an association required registration under the Joint Stock Companies Act, 1862, but the necessity for registration has since been judicially determined (*b*).

Friendly societies are also for the purpose of mutual insurance. They require registration under the Friendly Societies Act, 1875.

Companies under special statute.—4. Offices set up by the State to encourage providence and thrift, such as the Government Insurance and Annuity Department, and the special modes of insurance provided by Acts of Parliament for departments of the Civil Service, and in India (*c*).

Kind of companies.—Except those risks that are taken by underwriters at Lloyd's, the whole of the insurance business other than marine is carried on by companies, most, though not all, of
[* 362] which are incorporated. The continuousness *of corporate existence is favourable to the assured (*d*), and the business itself being reducible to a routine and system, is especially suitable for a joint-stock partnership (*e*).

The various companies which carry on insurance business have been constituted in different ways, and the form and mode of their constitution is still to some extent important as determining—(1) the rights *inter se* of the joint stock or shareholders, (2) the powers and mode of contracting given and prescribed to the company, (3) the extent of the shareholders' liability on the contracts made, (4) the manner of suing thereon, (5) the means of enforcing judgment thereon.

Formation of companies.—The modes in which existing insurance companies have been formed are—

A. By deed of settlement.
B. By royal chapter.
C. By special statute.
D. By letters patent.
E. Under the various Companies Acts.

These different modes of creation produced—

(1) Mere common-law partnerships.
(2) Corporations.
(3) *Quasi* corporations, suing by and being sued in the name of one of their members (*f*) or a registered public officer.
[* 363] *(4) Joint-stock companies registered and incorporated under the Companies Acts.

(*b*) *Re Padstow Total Loss Association*, 20 Ch. D. 137, 51 L. J. Ch. 344, 45 L. T. N. S. 774, 30 W. R. 326.

(*c*) *Boldero* v. *H. E. I. C.*, 11 H L. C. 405. *Underwood's Case*, 4 L R. 4 H. L. 580. *Edwards* v. *Warden*, 1 App. Cas. 281, 9 Ch. App. 495. *Robertson's Case*, 12 Moore P. C 4000. *Davies* v. *Trustees of Madras Fund*, 12 Moore P. C. 403 n., 7 Moore Ind. App. 364 n.

(*d*) See Adam Smith's Wealth of Nations, p. 340, edn. by M'Culloch, bk. v. c. 1, a. 1.

(*e*) 2 Stephen Comm. 126 (8th ed.).

(*f*) 7 Wm. IV. & 1 Vict. c. 73, s. 8.

The first charters granted to insurance companies were given under permission by statute.

These charters were in the nature of monopolies, whence the need to apply to Parliament for authority to grant them.

Few charters seem to have been granted to any insurance company by the Crown independently of Parliament (*g*).

Royal Exchange and London Assurance.—By 6 Geo. I. c. 18, Parliament empowered the King to grant two charters, constituting two marine insurance corporations, viz., the Royal Exchange and the London Assurance (*h*), and forbidding all other corporations for marine insurance. The purpose of this Act was to create two solvent insurance companies, to suppress all bubble companies and bodies presuming to act as corporate bodies without legal authority, and to give the two companies a monopoly of insurance as a business for corporate bodies (*i*).

Constitution of companies.—The corporations remain, but their monopoly has been removed (*j*), while, on the other hand, they have been permitted to insure over a wider area and against more risks than those contemplated by the original charter.

Special statutes.—Special statutes under which certain insurance associations are formed have the effect of charters, and clothe such companies with all the attributes of corporations. But most of the special Acts appear to do little more than provide for the mode of suing and being sued.

Very few insurance societies have actually been *formed [* 364] by a private Act; but many societies already existing, but unincorporate, have found it advantageous to apply for and to obtain incorporation, more especially those domiciled in Scotland.

Letters Patent Act.—By the Letters Patent Act (*k*) the Crown is empowered, on the application of any company formed by deed of partnership, to grant to such a company letters patent, authorizing it to sue and be sued by an officer named for the purpose, and by such letters patent to limit the liability of the members of the company.

The company, on obtaining this privilege, comes under certain regulations as to the registration of various particulars connected with its constitution and other matters pointed out in the Act.

This Act is not compulsory but permissive, granting a privilege to those who choose to apply for it. It is still in force, but applies only to companies formed before September 8, 1844, when the Joint-Stock Companies Act was passed (*l*).

Object of Joint-Stock Companies Act.—"The leading purpose of the

(*g*) Clifford on Private Bill Legislation, vol. 2, p. 593.
(*h*) S. 12.
(*i*) S. 18. As to the history of this Act and 6 Geo. IV. c. 87, see Clifford on Private Bill Legislation, vol. 2, p. 570.
(*j*) 5 Geo. IV. c. 114.
(*k*) 7 Wm. IV. & 1 Vict. c. 72.
(*l*) Taylor on Joint Stock Companies, p. 910 (1847).

first Joint-Stock Companies Act (*m*) was to enable a permanent company, consisting of changing shareholders, to make binding contracts, and sue and be sued, and do all the acts necessary for carrying on a trade. The preamble expresses an intention to invest them with the qualities and incidents of corporations with some modifications and subject to some provisions and regulations" (*n*).

7 & 8 Vict. c. 110, s. 2 (1844).—Every assurance company or association for the purpose of assurance or insurance upon lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire or by storm or [* 365] other casualty, or for granting or purchasing *annuities on lives, and every institution enrolled under any of the Acts of Parliament relating to friendly societies, which institutions shall make assurances on lives, or against any contingency involving the duration of human life to an extent upon one life, or for any one person to an amount exceeding £200, whether such companies, societies, or institutions shall be joint-stock companies or mutual assurance societies or both, was, if established after the commencement of 7 & 8 Vict. c. 110, s. 2, bound to register thereunder.

Quasi corporations.—Insurance companies registered under 7 & 8 Vict. c. 110, partake of corporate powers with several incidents of partnership, and have been termed *quasi* corporations (*o*). But the privileges of the statute are accorded only to those registered under the statute; and if registration be made as a company, they cannot afterwards register so as to lead the world to suppose them a corporation (*p*).

Company under 7 & 8 Vict. c. 110.—A company formed and duly registered under the first Joint Stock Companies Act (7 & 8 Vict. c. 110) for the purpose of insurance, and also for the granting of endowments, annuities, assurances during sickness, and loans, is an insurance company within 20 & 21 Vict c. 14, s. 27, and can sue without being registered under the Joint-Stock Companies Acts, 1856–57 (*q*).

Companies excepted from Act.—Certain insurance companies were excepted from the first Joint-Stock Companies Act—(1) In respect of the time of their formation, if their formation was begun before Sept. 5, 1844, they could not be completely registered or [* 366] brought (s. 59) within the Act (*r*); *(2) If incorporated by charter or Act of Parliament; or (3) If authorized by letters patent or statute to sue and be sued. And companies formed after

(*m*) 7 & 8 Vict. c. 110.

(*n*) *Prince of Wales Ins. Co.* v. *Harding*, E. B. & E. 183, 217, 27 L. J. Q. B. 297, 4 Jur. N. S. 851.

(*o*) *Ridley* v. *Plymouth Co.*, 2 Ex. 711, per Parke. B. Brice's Ultra Vires, p 12.

(*p*) *Reg.* v. *Whitmarsh*, 19 L. J. Q. B. 185.

(*q*) *London and Provincial Provident Society* v. *Ashton*, 12 C. B N. S. 709, 723, 11 W. R. 152, 7 L. T. N S 350. See also 25 & 26 Vict. c. 89, s. 8.

(*r*) Taylor on Joint-Stock Companies, 115.

the Act could, though within the definition of a company therein avoid the need of registering thereunder by obtaining a charter, private Act, or letters patent.

In consequence of this exclusion of assurance companies, many have since had to go to Parliament for private Acts.

Companies registered under 7 & 8 Vict. c. 110, must re-register.—The Companies Act, 1862, enforces registration on those companies which have been registered under the older Act 7 & 8 Vict. c. 110 (*s*), and the effect of such registration is exactly the same as if the company had been formed and voluntarily registered under the later Act (*t*).

What companies must register under Companies Act, 1862.—Every insurance company formed since Nov. 2, 1872, must be registered under the Act of 1862 (*u*).

Companies which ought to have, but have not registered as required, are under the disabilities of s. 210, and cannot sue at law or in equity, nor even present a petition for their own winding up (*x*).

Broadly speaking, by the Companies Act, 1862, s. 22, Legislature intended that all commercial undertakings consisting of more than ten persons, started after the commencement of that Act, should be registered. And mutual insurance associations, providing that the liability should be several only, are commercial undertakings for the acquisition of gain *within the Act, and must be [* 367] registered under it; and if not so registered are illegal associations, and cannot be wound up s. 199 of the Act (*y*).

Deeds of settlement open to inspection.—All companies registered under the Companies Acts, 1862, deposit with the registrar copies of their deeds of settlement, and thereby the same are made available for public inspection. An insurance company so registered is entitled to an injunction to restrain another insurance company from using its registered name calculated to cause the one company to be mistaken for the other (*z*).

All companies not so registered are bound to print their deeds of settlement, and to supply them on demand to every shareholder or policy-holder for not more than *2s. 6d.* (*a*).

Effect of registration.—The effect of the compulsory registration

(*s*) 25 & 26 Vict. c. 89, s. 209.

(*t*) *Ramsay's Case*, 3 Ch. D. 388, 46 L. J. Ch. 411, 35 L. T. L S. 654, 25 W. R. 279.

(*u*) 25 & 26 Vict. c. 89, s. 4. Ex parte *Hargrove*, 10 Ch. App. 545 n. Re *Padstow Association*, 20 Ch. D. 137, 51 L. J. Ch. 344, 45 L. T. N. S. 774, 30 W. R. 326.

(*x*) Re *Waterloo Life Co.*, 41 Beav. 586, 32 L. J. Ch. 370, 11 W. R 134, 7 L. T. N. S. 459, 9 Jur. N. S. 291. *Evans* v *Hooper*, 1 Q. B D. 45, 33 L. T. N. S. 474, 24 W. R 246.

(*y*) *Cory and Hawksley's Case*, 3 Ch. D. 522, 32 L. T. N. S. 525, 23 W. R. 939, per Jessel, M.R.

(*z*) *Accidental Insurance Co.* v. *Accident, Disease, and General Insurance Corporation*, 54 L. J. Ch. 104, 51 L. T. 597.

(*a*) 33 & 34 Vict. c. 61.

aforesaid is to put the insurance company so registering within all the rules and regulations of the Act of 1862.

What is an insurance company under Companies Act.—For the purpose of that Act, any company which is not concerned solely in the business of insurance, but carries on therewith any other business or businesess, is deemed an insurance company (*b*).

What is an unregistered company.—Any company registered under other Acts antecedently to the passing of the Act of 1862, is an unregistered company withing s. 199 of that Act. In *Bowes* v. *The Hope Life Insurance Company* (*c*), the Act was applied to a company formed in 1852, and registered under the Act of 1844 (7 & 8 Vict. c. 110), but which had ceased to carry on business in 1855.

[* 368] **Difference between corporate and incorporate companies immaterial.*—The distinction between corporation and incorporation seems now immaterial (*d*).

Reason for incorporating by statute, per Lord Wensleydale.—"It is obvious," (says Lord Wensleydale) "that the law as to ordinary partnership would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case, to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business (*f*), would soon lead to the utter ruin of the contributories. On the other hand, the Crown would not be likely to give them a charter which would leave the corporate the only fund to satisfy the creditors. The Legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders by requiring the co-partnership deed (of settlement or articles of association) to be registered (*g*) and made accessible to all, and besides including some clauses as to the management. *All persons have notice of contents of deed and Acts.*—All persons must, therefore, take notice of the deed and the provisions of the Companies Acts in force for the time being. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give credit to any unauthorized persons, they must be contented to look to them only, and not to the company at large. *Directors' acts ultra vires not binding.*—The stipulations of the articles of asssociation or the deed of settlement which restrict and regulate their authority are obligatory upon those who

(*b*) See s. 3.

(*c*) 11 H. L. C. 389.

(*d*) Per Cotton, L.J., in *Ashworth* v. *Munn*, 15 Ch. D. 363, 375, 28 W. R. 965, 50 L. J. Ch. 107. *Myers* v. *Perigal*, 2 De G M. & G. 599.

(*f*) *Ernest* v. *Nicholls*, 6 H. L. C. 401, per Lord Wensleydale. *Balfour* v. *Ernest*, 5 C. B. N. S. 601, 28 L. J. C. P. 170.

(*g*) Companies Act, 1862.

deal with the company, and directors can make make no contract *so as to bind the whole body of shareholders, [* 369] for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else. *Discretionary powers of directors.*—Those provisions which give to the directors discretionary powers of management do not affect strangers, and the shareholders are bound by the exercise of the discretion which they have consented to give. *Effect of directory conditions.*—Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers, but they may form the subject of an action by the shareholders against the directors for their breach of covenants expressed or implied in the deed."

The doctrine as above laid down by Lord Wensleydale (*h*) has been steadily followed, but with a tendency to treat matters as directory which Lord Wensleydale would probably have considered essential.

Informal affixing of company's seal by director.—Thus in *Prince of Wales Assurance Company* v. *Harding* (*i*), where a policy was made, sealed, and executed by three directors, as required by the deed of settlement, but without an order for the affixing of the common seal, and was signed by three directors and the manager, as also required, the Court of Queen's Bench held that the simple omission of such a formality did not annul the instrument, the provision being merely directory. *What provisions directory.*—And generally all formalities which relate merely to the internal arrangements of the insurance company will be deemed directory (*k*).

And on this principle a policy issued by persons purporting to be directors has been held binding when the real directors could have obtained, but did not seek, an injunction against the ostensible directors (*l*).

**Powers to grant policies. Invest premiums.*—The chief [* 370] powers taken by an insurance company are—(1) to grant policies, &c., against particular risks, and accept premiums therefor, (2) to invest the premiums so received in manner most profitable to the company and compatible with their obligations as insurers. The other powers taken are merely incidental thereto, and if not contained in the deed of settlement may often be implied therefrom.

Company's business must conform to its constitution.—Companies must confine themselves to business in accordance with their de-

(*h*) *Ernest* v. *Nicholls*, 6 H. L. C. 401.

(*i*) E. B. & E. 183, 27 L. J. Q. B. 297, 4 Jur. N. S. 851.

(*k*) See Re *Athenæum*, Ex parte *Eagle Co.*, 4 K. & J. 549, 27 L. J. Ch. 829, 6 W. R. 779 *Gordon* v *Sea Fire Co.*, 1 H. & N. 599, 26 L. J. Ex. 202. *Braunstein* v. *Accidental Death Co.*, 1 B. & S. 782, 31 L. J Q. B. 17, 5 L. T. N. S. 550, 8 Jur. N. S. 506.

(*l*) Re *County Life*, 5 Ch. App. 288, 39 L. J. Ch. 471, 2 L. T. N. S. 537, 18 W. R 390.

clared purpose. For example, a proprietary company being a joint-stock partnership, the whole of the profits of which are divisible amongst the shareholders, cannot grant a policy participating in profits, nor can a mutual company grant a policy creating no liability (*m*). But by the constitution of the company or statute special means may be provided for shifting a company from one class to another.

Mutual insurance company can't issue policies to non-members.—In a mutual insurance association, policies cannot be issued to non-members at special or any rates, unless (1) the rules of the association so provide, or (2) some means of agreeing to such issue be provided by the rules, and the method there indicated be properly followed (*m*).

Policies ultra vires do not bind company.—If such policies are issued *ultra vires*, the policy-holders are not creditors of the association at all, since the contract, not being within the scope of the agent's authority, does not bind the association at all (*m*).

The persons who enter into *ultra vires* contracts with an insurance company have no right to complain. They are held to have had notice of the nature of the body which was contracting with them, and of course notice of the rules and regulations which form the constitution of that company (*n*).

How contracts made.—The contracts of an insurance com-
[* 371] pany must be in *the form prescribed by its constitution (*o*).

But cases may arise in which the direction contained in the constitutive instruments of the company are not absolute; and the courts will not be astute to prevent insurance companies from resisting claims by setting up the absence of a seal, or non-compliance with directions within their own special control. Thus it has been held in Canada that, if they receive premiums, they must execute and issue a valid policy (*p*).

Contracts incidental to the management of the company need not be by writing or under seal (*q*).

Contracts of insurance must not only be evidenced in the manner required by the constitution of the company; they must also undertake permitted risks, and must be in the form prescribed, if any (*r*), and contain the limitations of liability, if any, required by such constitution.

In Canada absence of seal not pleadable.—In Canada all the Courts

(*m*) *Cory and Hawksley's Case*, 32 L. T. N. S. 525, 23 W. R. 939, 34 Ch. D. 522

(*n*) *Ibid.*, and see *Ernest* v. *Nicholls*, 6 H. L. C. 407.

(*o*) *Montreal Insurance Co.* v. *M'Gillivray*, 13 Moore P. C 89, 8 W. R. 165.

(*p*) *London Life Co.* v. *Wright*, 5 Canada (S. C.) 466

(*q*) Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37. *Beer* v. *London and Paris Hotel Co.*, L. R 20 Eq 412

(*r*) See in *Taunton* v. *Royal*, 2 H. & M. 135, 33 L. J. Ch. 406, 10 L. T. N. S. 156, 12 W R. 549. Railway Passengers' Assurance Co.'s Act (27 and 28 Vict. cap. cxxv.), schedule.

held that for an insurance company to set up the want of a seal (prescribed as necessary by its Act of incorporation) is such a fraud as a Court of Equity ought to prevent (*s*).

Policy void, insurers bound to issue fresh one.—In an older case, while allowing that a certain policy was void because not in the statutory form, the Court deemed the insurers bound to issue a valid policy of proper date (*t*).

Manager granting policy ultra vires.—Where an insurance company is incorporated by public *statute, the power of [*372] its manager in relation to insurance must be taken to be known by persons insuring with the company. And if he makes policies outside the scope of his authority, they will not bind the company. And if by special Act the company can only bind itself by policy, and not by parol contract of insurance, the power of the manager is restricted by this limitation of the power of the principals (*u*).

Effect of ultra vires acts. Of informal acts.—Speaking generally, an insurance company, like any other company, is bound by any deed under its seal (*v*), unless fraud (*x*) or illegality be established (*y*). Illegality will include *ultra vires* acts, since corporations and analogous bodies, being creatures of law, cannot lawfully go beyond the four corners of their constitution. But mere informalties in the exercise of their duties by directors will not invalidate a policy (*z*) for a deed of settlement and a private Act of Parliament constituting a company are to be construed as a partnership deed. To violate them may be a breach of trust as between the directors and the shareholders, but acts not done according to them may bind the company (*a*).

Appointment of solicitor by articles of association.—Where the articles of association of an insurance company appointed a solicitor to the company who was to transact all their legal business, and not to be removable except for misconduct, it was held not to amount to an agreement to employ him, the articles being a con-

(*s*) *London Life* v. *Wright, supra. Wright* v *Sun Mutual*, 29 U. C. (C. P.) 221.

(*t*) *Perry* v. *Newcastle Fire Co.*, 8 U. C. (Q. B) 363. See *Fowler* v. *Scottish Equitable*, 28 L. J. Ch. 225, 32 L. T. 119, 4 Jur. N. S. 1169, 7 W. R. 5 *Prince of Wales Insurance Co.* v. *Harding* E. B. & E. 183, 222, 27 L. J. Q. B. 297, 4 Jur. N. S 851

(*u*) *Montreal Insurance Co.* v. *M'Gillivray*, 13 Moore P. C. 87, 125 8 W. R. 165.

(*v*) *Agar* v. *Athenæum Ins. Co* , 3 C. B. N. S.. 725, 27 L. J. C. P. 95, 6 W. R. 277.

(*x*) *Athenæum Ins. Co.* v. *Pooley*, 3 De G. & J. 294, 28 L. J. Ch. 119, 5 Jur. N, S 129.

(*y*) *Cary and Hawkley's Case*, 3 Ch.D. 522, 32 L. T. N S. 525, 23 W. R. 939.

(*z*) *Prince of Wales Insurance Co.* v. *Harding*, E. B. & E. 183, 27 L. J. Q B. 297, 4 Jur. N. S 851

(*a*) *Bill* v. *Darenth Railway Co.* 1 H. & N. 305. *Bargate* v. *Shortridge*, 5 H L. C. 297. *Prince of Wales Ins. Co.* v. *Harding, supra. Sperings' Appeal*, 10 Am. Rep. 684, 71 Penn. St. 11.

tract between the shareholders alone, and, so far as the [*373] solicitor was concerned, *res inter alios acta*. Lord *Cairns doubted whether the clause was not void as against public policy (*b*).

Solicitor cannot claim for costs as a mere creditor.—The solicitor of an insurance company cannot in respect of this bill of costs claim to be treated as an outside creditor and be paid in full, for he must be taken to have the fullest notice and knowledge of the constitution of the company and the limitation placed thereby on the liability of the shareholders. If he is a shareholder, the case is still stronger (*c*).

Debentures invalid when in fraud of company.—If debentures are issued within the powers of an insurance company, but in fraud of the company, they will be invalid in the hands of a *bona fide* purchaser without notice, provided that the shareholders, on becoming aware of the transaction, do not acquiesce or do other acts which would raise an estoppel (*d*).

Person who is party to act ultra vires cannot claim.—Whenever any party dealing with an insurance company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, *e. g.*, to throw upon them unlimited liability when the directors are required so to frame policies as to confine the remedy of the assured to the capital and funds in the hands of the company, the shareholders might very fairly and reasonably deny their liability on that policy. But it would be unjust to allow them to take advantage of an irregularity of the directors (who are denominated their agents) in cases where they cannot show that they have been in any way prejudiced by the irregularity, and the assured cannot be charged with any fraud or impropriety (*e*).

If risk taken ultra vires assured can't recover.—The risk un- [*374] dertaken by a contract of insurance *must be within the powers given to or taken by the company. If the company is not authorized to take the particular class of risk, the assured cannot recover for a loss by that risk in any case where he has no notice, constructive or express, of the powers of the company.

The Royal Exchange Assurance, for instance, could not under its original Act insure on vessels engaged in inland navigation, nor could the company do so until empowered by 41 Geo. III. c. 57.

Misapplication of funds restrained by injunction.—The Courts have always been careful to prevent the application of the moneys of the shareholders who contribute to joint-stock undertakings to any pur-

(*b*) *Ely* v. *Positive Assurance Co*, 1 Ex. D. 88, 45 L. J. Ex. 451, 34 L. T N S. 190, 24 W. R. 338. See *Summers* v. *Eldston*, 18 Jur. 21 (H. L.).

(*c*) *Sadler's Case*, 16 S. J. 571 (Alb. Arb), per Lord Cairns.

(*d*) *Athenæum* v. *Pooley* (1858), 3 De G. & J 294, 28 L J. Ch. 119, 1 Giff. 102. And see *British Mutual Banking Co.* v. *Charnwood Forest Railway*, 18 Q. B. D. 714.

(*e*) *Prince of Wales Ins. Co.* v. *Harding*, E. B & E. 183, 216, 27 L. J. Q. B. 297, 4 Jur N. S. 851. *Agar* v. *Athenæum Ins Co.*, 3 C. B. N. S. 725, 72 L J. C. P. 95, 6 W. R. 277.

pose other than that which is legitimately the purpose and object of the association; and if a case arises where the managers of such an undertaking so apply its money, any shareholder may obtain an injunction restraining them therefrom (*f*).

Power to pay loss not within policy.—But if the company has power to grant policies against a certain risk, and a loss occurs by such risk to property on which a policy has been granted excepting such risk, it would seem that the general body of shareholders could waive such exception, and that the directions of an insurance company usually have sufficient discretion given them in management to enable them to waive the exception and pay the loss, if it seems in the company's better interest to do so. To do so is, of course, a species of advertisement.

The principle seems to be that what the company as a whole can do, its general agents can likewise do (*g*).

Powers of investment.—Powers of investment provided by the constitution of the company may be varied or amended, but, until amended, cannot be exceeded.

Powers to lend on the security of shares in the company [375] or its own policies, or on mortgage, must be specially inserted. And the latter, in the case of corporations, requires special provisions, owing to the Mortmain Acts, since by foreclosure they may become owners of and dealers in land (*h*).

Thus the Royal Exchange Assurance could not advance money on the security of freehold, copyhold, or leasehold property until empowered to do so by 6 Geo. IV. c. 36, which Act enables it also to foreclose, but not to hold for more than two years, except in case of a difficulty as to the title; and it was allowed to dispense with a licence in mortmain.

An investment clause, empowering the directors of an insurance company to buy, sell, and re-sell life, reversionary, and other personal estates and interests is not wide enough to include dealings in stock and shares in the face of controlling words, such as generally to carry on the business of life insurance and of an annuity, endowment, loan, and reversionary interest society (*i*). Nor can an insurance company take shares in a building society.

"A corporation proposing to engage in any transaction not within its express or implied power may be restrained from so doing or so continuing" (*k*).

Shareholder's liability affected by nature of company.—A shareholder's liability is affected by the constitution of the insurance com-

(*f*) *Taunton* v. *Royal Insurance Co.*, 1 H. & M. 153, 33 L. J. Ch. 406, 10 L. T. N. S. 156, 12 W. R. 549, and cases there cited. See per Cranworth, C., in *Eastern Countries Railway Co.* v. *Hawkes*, 5 H L. C. 331, 348.

(*g*) *Taunton* v. *Royal*, *supra*.

(*h*) *Royal Bank of India's Case*, 4 Ch. App. 252, 260, per Selwyn, L. J.

(*i*) *Athenæum* v. *Pooley*, 28 L. J. Ch. 119, 3 De G. & J. 294, 1 Giff. 102, 5 Jur N. S. 129.

(*k*) Brice Ultra Vires 178.

pany in which he holds. If it is a corporation other than a company incorporated under the Joint-Stock Acts, he is under no individual liability beyond his liability to the corporate body of which he is a member. If it is a company under the Companies Acts, he is liable only to the amount limited by the memorandum of association.

[* 376] *If a company is registered as unlimited, it may be re-registered as limited under 42 & 43 Vict. c. 76.

Where the company is not a corporation, or brought within the Companies Act, it is a common-law partnership, with the ordinary incidents thereof, unless any special provisions in its deed of settlement or the policies restrict the liabilities, and in their absence the liability of each shareholder is unlimited.

Executors of shareholder as contributories.—Executors of a deceased shareholder, who have transferred their testator's shares before liquidation, cannot, nor the survivor of them, be placed on the list of contributories (*l*)—

(1) In respect of debts due at the time of transfer, as to which the liability of shareholders is limited to their shares in the capital —*e. g.*, debts on policies, annuities, and indemnities given on taking over the business of other companies.

(2) In respect of debts as to which such executors are only in the position of sureties for the transferee of the shares—*e. g.*, general debts which accrued before the transfer.

Where shares in name of trustees.—(3) For the costs of the liquidation.

Where shares stood in the joint names of two persons without beneficial ownership, and one was dead, his executors were put on the list of contributors, jointly with the surviving shareholder, but only in respect of the liabilities up to the time of his death (*m*), on the ground that the testator was liable *inter socios* (by signing the deed of settlement) on the joint and several covenant to pay calls therein contained.

But the executors of a man who in 1846 applied for and paid the deposit on shares, and was registered in respect thereof, but never signed the deed of settlement, were held not liable to contribute in 1872 (*n*).

[*377] **Secretary of company being transferee of shares in trust for company liable as contributory, but entitled to indemnity.*—The secretary of an insurance company, to whom shares in the company were transferred, to be held by him as trustee for the company, was held liable to contribute in respect thereof, but entitled to prove for indemnity. It would have been otherwise if the act constituting him such trustee was to his knowledge *ultra vires* (*o*).

(*l*) *Clarke's Executors' Case*, Reilly (Alb. Arb) 228, 16 S. J. 752.

(*m*) *Kirby's Case*, Reilly (Alb. Arb.) 67.

(*n*) *M'Kenzie's Executor's Case*, 18 S. J. 223 (Eur. Arb.).

(*o*) *Easum's Case*, Reilly (Alb. Arb.) 170.

Executors of shareholders who have issued statutory advertisement for creditors, liable to contribute.—When executors of a shareholder claim the benefit of a statutory advertisement for creditors (by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 99), they will still be entered on the list of contributories, with a note of their claim as to full distribution of assets.

Vendor of shares in amalgamated company liable if on register.—A man whose name is on the register of the company which has been amalgamated with another to which he has sold his shares, is still liable as a contributory if his name remains on the register, even though the purchasing company had undertaken to have it removed. He will of course have a remedy over for breach of the undertaking (*p*). So also if he has accepted shares in the transferee company instead of his old shares, if his name is still on the old register in respect of them (*q*).

Executor who has sold testator's shares to some one not capable of being put on register, still liable.—If an executor does not sell his testator's shares to some one whose name can be put on the register instead of the testator, but receives back from the amalgamating or transferee company the amount paid on the shares, and delivers up the share certificates to them, he will not be discharged from liability on those shares as a contributory to the amalgamated or transferor company, unless all outstanding creditors thereof have been settled with, or have assented to the transfer (*r*).

**Contributory entitled to have bonus deducted from calls.*—A [* 378] contributor when called on is entitled to have deducted from the calls made on him the amount of bonusses appropriated out of profits to his shares and credited thereon (*s*).

Liability notwithstanding forfeiture for not paying calls.—Forfeiture of his shares for non-payment of calls will not relieve him from contributing in the winding up (*t*).

Transfer must be complete or shareholder must contribute.—If a shareholder has taken steps to transfer his shares before winding up, but by no fault of the directors has failed to complete them, he must contribute (*u*). So if they disapprove the transferee (*v*).

Liquidating shareholder whose trustee disclaimed.—If the shareholder has liquidated, and his trustee disclaimed, neither can be made a contributory if the company has proved in the liquidation for unpaid calls (*x*), or could have so proved, but has failed to do

(*p*) *Lee's Case*, Reilly, (Alb. Arb.) 3, Buckley 352, 353 (1st ed.). *Nicholl's Case*, Reilly (Alb. Arb.) 40, executor of deceased shareholder.

(*q*) *Pownall's Case*, Reilly (Eur. Arb.) 8

(*r*) *Lancy's Case*, Reilly (Eur. Arb.) 18.

(*s*) *Cathie's Case*, Reilly (Eur. Arb.) 27.

(*t*) *Bridger's and Neil's Case*, 4 Ch. App. 266.

(*u*) *Read's Case*, Reilly (Eur. Arb) 19.

(*v*) *Lloyd's Case*, Reilly (Eur. Arb) 35.

(*x*) *Brown's Case*, Reilly (Eur. Arb.) 32.

so, since their claim is not incapable of being fairly estimated within the Bankruptcy Acts (*y*).

Promoter's shares fully paid carry liability to contribute.—Where free shares fully paid up were distributed amongst the promoters of an insurance company, the recipients thereof were held liable to contribute in the windlng up of the company, as the transaction was a fraud on the other shareholders, but without prejudice to an indemnity from the directors who gave the shares (*z*).

Director liable to contribute in respect of shares necessary to qualify.—Where the articles of association provide that no one shall be eligible as a director who does not hold a certain number of shares in his own right, and that any director who ceases to hold
[* 379] the requisite number *shall be disqualified, any one who is elected and acts as a director without qualifying will be liable as a contributory to the number of shares which he ought to have held, since by acting as director he enters into an implied contract to take the qualifying shares (*a*).

And where the brother of a managing director executed the deed of settlement in respect of part of a number of shares improperly given his brother by the directors, he was held liable as a contributory in respect of such part (*b*).

Shareholder fraudulently induced to take shares.—The same principle applies as between an insurance company and its shareholders. Where the latter have been fraudulently induced to take shares, they will have no defence to an action for calls thereon unless they have repudiated the contract and done no act to make themselves liable as shareholders after discovering the fraud. But till the shareholder has succeeded in severing his connection with the company and has ceased to remain on the register, he will be liable with the rest to contribute within the limits prescribed in the constitutive instruments to the payment of claims on the company (*c*).

Holding of land. Two questions.—With regard to the holding of land by insurance companies two questions arise—

(1) Whether a company can hold land at all?

(2) Whether, having regard to the Statutes of Mortmain, shares in a company holding land can be devised or bequeathed for charitable purposes?

[* 380] **Power to hold land.*—With respect to question (1), the power to hold lands may, speaking generally, be said to depend upon the powers conferred by the instrument constituting the company (*d*). Where a company is registered under the Joint-

(*y*) Re *Mercantile Mutual Marine*, 25 Ch. D. 415.

(*z*) *Darnell's Case* (1857), 3 Jur. N S. 803.

(*a*) *Stephenson's Case*, 45 L. J. Ch. 488, per Jessel, M. R.

(*b*) *Lord Claud Hamilton's Case* (1852), 8 Ch. App. 548, 42 L. J. Ch. 465. *Holt's Case*, 15 Jur. 869, per Cranworth, V. C.

(*c*) *Deposit and General Life* v. *Ayscough*, 6 E. & B. 761, 26 L. J. Q. B. 29. 2 Jur. N. S. 812. See *Partridge* v. *Albert*, 16 S. J. 199, per Lord Cairns (Alb. Arb.).

(*d*) Brice Ultra Vires 78.

Stock Companies Act, 1844 (7 & 8 Vict. c. 110), it may by s. 25 purchase and hold lands, and the power of a company registered under the Act of 1862 to hold land is unrestricted (*e*).

Shares in private partnership within Mortmain Act.—With respect to question (2), shares in a partnership holding land, such partnership not being a joint-stock company, are an interest in land under the Mortmain Act, and therefore cannot be disposed of by will to charitable purposes.

Shares in joint-stock companies.—But shares in a joint-stock company holding land, whether the company be corporate or unincorporate, are not within the Statutes of Mortmain, and will therefore pass by will to a charity (*f*).

Reason for the distinction.—The distinction between the case of a joint-stock and a non-joint-stock partnership holding land is this, that in the case of a joint-stock company the intent and meaning of the partners is that the partnership is to be in the nature of a corporation, and intended to have perpetual existence, with fluctuating bodies of members from time to time, just like a corporation. No partner is ever supposed to have anything to do with the land except as one of the society through the machinery provided by the Act or deed of settlement and is never intended to have anything to do with the land in any shape or form, except to get the profits from the land, or from the business of which the land is a part, and it is always intended that every share should pass in the market as a distinct thing, and in point of beneficial ownership wholly unconnected with the land, or *with the real [* 381] assets of the partnership property of the company (*g*).

Policy secured on real estate of company not within Mortmain Act.—A policy secured on the property of a company which consists partly in real estate is not so connected with land as to make a gift of the policy to a charity invalid under the Mortmain Act, whether the policy-holder is or is not a member of the company (*h*).

All life insurance companies are under Act of 1870.—All life insurance associations registered or unregistered under the Companies Acts, corporate or unincorporate, except those registered under the Friendly Societies Acts, are within the Life Assurance Companies Act, 1870 (*i*).

Fire insurance companies are under the ordinary law as to joint-stock companies, but the business of life insurance companies is to a certain extent regulated by special statutes.

Deposit by life companies of £20 000.—By the Life Assurance Companies Act, 1870, s. 3, every company commencing the busi-

(*e*) 25 & 26 Vict. c. 89, ss. 18–21.

(*f*) *Ashworth* v. *Munn*, 15 Ch. D. 363, 50 L. J. Ch. 107, 28 W. R. 965. *Myers* v. *Perigall*, 2 De G M. & G. 599. 25 & 26 Vict. c. 89, s. 22.

(*g*) Per James, L. J., *Ashworth* v. *Munn*, 15 Ch. D. 363 at 368, 50 L. J. Ch. 107, 28 W. R. 965.

(*h*) *March* v. *Attorney-General*, 5 Beav. 433.

(*i*) 33 & 34 Vict. c. 61, s. 2.

ness of life assurance within the United Kidgdom, before it can get a certificate of incorporation, must pay into the Chancery Division of the High Court the sum of £20,000 (*k*).

Investment thereof.—This sum is to be invested in one of the securities usually accepted by the High Court for the investment of funds placed from time to time under its administration. The company making the deposit is to choose the particular security and to receive the income therefrom (*l*). And the said sum in court is to be returned to the company so soon as the life assurance fund accumulated out of the premium reaches £40,000 (*m*).

[* 382] *Once the £20,000 is paid into court, all orders with respect to paying the same into or out of court, and the investment or return thereof, and the payment of the dividends and interest thereof, may be made, altered, and revoked by the like authority and in the like manner as orders with respect to any other money to be paid into or out of court, but subject to any rules made or to be made by the Board of Trade as to the payment and repayment of the deposit, the investment or dealing with the same, the deposit of stocks or securities in lieu of money, and the payment of the interest or dividends from time to time accruing due on any such investment, stocks, or securities in respect of such deposit (*n*). The Court will only allow investment in securities ordinarily accepted by the Court.

The deposit is part of company's assets.—The deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and such deposit upon the incorporation of the company shall be deemed to have been made by, and to be part of the assets of, the company (*o*).

Part of life funds.—The said deposits shall, until returned unto the company or the depositors, be deemed to form part of the life assurance fund of the company (*p*).

Deposit by foreign companies.—Very few life insurance offices seem to have been founded since 1870. Some foreign companies, however, have commenced business here, and a question may be raised whether their foreign assets are to be estimated in deciding whether or not they must pay into court or not. From the wording of the statute they would seem bound in any case to make the pay-

[* 383] ment as a preliminary to getting their certificate of *incorporation, and there is no mention of dispensing with the payment. On the other hand, there seems no reason why the life

(*k*) 33 & 34 Vict. c. 61, s. 3, as amended by 34 & 35 Vict. c. 58, s. 1.

(*l*) The object of the section is to prevent bubble companies being created simply for sale, and to test *bona fides*, 202 Hansard 1171.

(*m*) 34 & 35 Vict. c. 58, s. 1.

(*n*) 35 & 36 Vict. c. 41, s. 1. The Board of Trade Rules were made Aug. 28, 1872.

(*o*) 35 & 36 Vict. c 41, s. 1.

(*p*) See In re *Colonial Mutual Life Society*, 21 Ch. D. 887, 46 L. T. N. S. 282, 30 W. R. 458.

assurance fund accumulated out of the premiums should be within the jurisdiction. And this view would seem to prevail, as the New York Life Assurance Company appears not to have made any payment into court, and instead thereof has invested a large sum with English trustees, to form a security for policies issued to people in the United Kingdom (*q*).

Keeping of company's accounts. Life assurance fund a separate trust fund for sole security of policy-holder.—The funds of all insurance companies derived from life assurance annuity contracts must be carried to a separate account and fund, called the life assurance fund of the company; and that fund is made by the Act as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on only life business, and is not liable for any contracts of the company to which it would not have been liable had the company confined itself to life assurance (*r*).

Security where contracts made before August 1870.—This enactment does not diminish the liability of the life assurance fund for any contract of the company made before August 9, 1870. The holders of such contracts can still have recourse to the fund, which, so far as they are concerned, is not a trust fund for the policy-holders (*s*).

Or where the company is mutual.—This provision as to a life assurance fund does not apply to companies the whole of whose profits are divided among the policy-holders, and whose policies bear on the face of them a distinct declaration of the liability of the policy-holders (*t*).

Such a company is a pure mutual company, where all must contribute, and in the profits of which all *share. [* 384] There was at the passing of the Act only one such not coming within the Friendly Societies Acts (*u*).

Company must lodge balance-sheet with Board of Trade.—Every company issuing or liable on policies of assurance, or granting annuities on human life, within the United Kingdom, not being registered under the Friendly Societies Acts, must—

Annually at the end of its financial year prepare and deposit with the Board of Trade a statement of its revenue account and balance-sheet for that year, which, if the company carry on life business exclusively, must be in the forms contained in the first and second schedules to the Act, and, if concurrently with other business, must be in the forms contained in the third and fourth schedules thereto. Any of these forms may be altered by the Board of Trade on the application or with the consent of a company for the purpose of adapting them to the circumstances of such company, or of better carrying into effect the object of the Act, which

(*q*) 33 & 34 Vict. c. 61, s. 4, as amended by 35 & 36 Vict. c. 41, s. 2.

(*r*) 33 & 34 Vict. c. 61, sched. 4, note.

(*s*) 35 & 36 Vict. c. 41, s. 2, and see 202 Hansard 1173.

(*t*) 33 & 34 Vict. c. 61, s. 4.

(*u*) See 202 Hansard 1173.

has no preamble, but is to amend the law relating to life assurance companies.

Acturial investigation of companies affairs.—Companies established before the Act must every ten years, and every company established after the Act must every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws, cause an investigation to be made into its financial condition by an actuary, and shall cause an abstract of the report of such actuary to be made in the form prescribed in the fifth schedule to the Act.

Besides the abstract of the acturial report, and within nine months after the accounts of a company are made up for the purposes of the actuary's investigation, each company is bound [* 385] to prepare a statement *of its life assurance and annuity business up to the date of such investigation. *Statement of business.*—Those companies which have an annual investigation of their financial condition need not, however, send in an annual statement but are left free to send it in when and how they like, at intervals not exceeding three years.

The form in which the statement is to be made is prescribed by schedule 6 to the Act, but may be varied by the Board of Trade under the same circumstances and with the same objects as the requirements of other schedules may be altered.

Abstracts and statements to be signed and printed.—All these statements and abstracts must be signed by the chairman and to directors and the principal officer managing the life-insurance business, and by the managing director, if any, and must be printed.

(1) The originals, with three printed copies, must be deposited with the Board of Trade within nine months of the date prescribed for preparation of the original, and the Board of Trade must lay annually before Parliament the statements and abstracts of reports deposited with (*v*) them under the Act during the preceding year, whether or not they consider the statement, &c., to be in accordance with the Act (*x*).

(2) Printed copies must be forwarded by post or otherwise on application to every shareholder and policy-holder in the company.

Act of 1870 extends to a single insurer.—The Life Assurance Companies Acts include life insurance by single underwriters, since by the interpretation clause (*y*) company is explained as applying to any person or persons or body corporate or not incorporate, [* 386] and this wide definition therefore makes the *provisions of the Act apply to any one or more persons contemplating the business of life insurance, and practically excludes from such busi-

(*v*) 33 & 34 Vict. c. 61, s. 24.

(*x*) 35 & 36 Vict. c. 41, s. 3.

(*y*) 33 & 34 Vict. c. 61, s. 2.

ness the very few cases in which life assurance would or could be made by underwriters (*z*).

Contribution to Fire Brigade.—The duty to contribute to the Fire Brigade rests as much on a single underwriter as on the great insurance companies, if he too takes fire risks (*a*).

(*z*) *Whittingham* v. *Thornborough*, 2 Vern. 206, Prec. Ch. 20. *Ross* v. *Bradshaw*, 1 Wm. Bl. 312, 2 Park Ins. (8th ed.) 934.
(*a*) 28 & 29 Vict. c. 90, s. 27.

[* 387]

*CHAPTER XXI.

RIGHTS OF POLICY-HOLDERS.

33 & 34 Vict. c. 71, 34 & 35 Vict. c. 58, 35 & 36 Vict. c. 41.—Under the Life Assurance Companies Acts (1870, 1871, 1872) the policy-holders of any company, however constituted, are entitled—

(1) To copies of the statements of business, assets and actuarial reports required by these Acts to be made (*a*).

(2) To copies of the shareholders' address-book, on paying a sum not exceeding *6d.* per 100 words (*b*).

(3) To printed copies of the deed of statement, on payment of a sum not exceeding *2s. 6d.* (*c*).

Further, one-tenth of the policy-holders in any insurance company can stop all amalgamation or transfer or life insurance business by or to that company (*d*).

These rights of knowing the constitution and controlling the dealings of an insurance company given by statute are quite independent of those accorded to them by the constitution of the company itself.

Policy-holder is creditor.—A policy-holder in a proprietary company is simply a contingent creditor. He is under no liability whatever to other policy-holders or to the company itself, since he need not even continue his premiums. He cannot interfere [* 388] in the management of the company, *except, perhaps, to restrain a violation of the deed of settlement (*d*).

Whether participating policy-holder liable as partner.—In companies where policy-holders are allowed to share in the profits, participating policy-holders are not usually liable as contributories (*e*), since the obligation to contribute depends on other considerations than sharing profits, which will alone not make such persons partners (*f*).

Policy-holders and shareholders.—Even where a policy-holder might be treated by an outside creditor of an insurance company

(*a*) 33 & 34 Vict. c. 71, s. 11.
(*b*) *Ibid.*, s. 12.
(*c*) *Ibid.*, s. 13.
(*d*) *Ibid.*, s. 14.
(*d*) *Aldebert* v. *Leaf*, 1 H. & M. 681, 10 L. T. N. S. 185, 12 W R. 462.
(*e*) Re *English and Irish Church and University Assurance Co.*, 1 H. & M. 85, 8 L. T. N. S 724, 11 W. R. 681.
(*f*) *Cox* v. *Hickman*, 8 H. L. C. 286. *Bishop* v. *Scott*, 7 L. T. N. S. 570. Re *English and Irish Church, &c., Society, ubi supra.*

as a partner in the concern, the shareholders cannot insist on his contributing unless there is something within the four corners of the deed of settlement to make him so liable.

Even where a policy-holder participates in profits, has power to vote at meetings, and on winding-up is entitled to the surplus assets after the shareholders have been paid in full, these are the only advantages to induce him to take out a policy, and he does not by so doing, nor by any ordinary deed of settlement, make any undertaking to contribute with the shareholders towards meeting the liabilities of the company (*g*).

Non-liability of participating policy-holders where claims are to be charged on funds of company.—Where in a mutual insurance society some of the policy-holders participate and others do not participate in the profits, but a condition is indorsed on all policies issued by the society, that all claims are to be limited to the stock and funds of the society, in virtue of such condition the participating policy-holders, though they are in reality the only members of the mutual society, cannot be made to contribute (*h*)

**Policy-holders in mutual company.*—Under a mutual society [* 389] of the older type, all policy-holders were held bound to contribute. Marine mutual companies are of this kind (*i*). Certain societies provide for gradually creating an insurance fund, and paying off the original members in favour of policy-holders not liable. *Construction of a mutual company.*—It is assumed that the participating policy-holders will make payments from time to time in the shape of premiums upon their policies, but the basis of the whole arrangement of this company, and of any mutual insurance company, is this, that there will be, if not a legal compulsion, yet a moral compulsion on persons who have commenced insurances to keep them up and to pay the premiums which must be paid for that purpose. That is the basis of the contract and foundation of the arrangement in a mutual company. Those who join them know that they have that security, and that only for the swelling and increase of the assets of the company (*k*).

Policy-holders as contributors.—Where a life insurance company was formed upon the mutual principle, and the articles of association provided that the company should consist of two classes of members—namely, shareholders so long as there should be any shareholders, and insurance members, defined to mean policy-holders with participation in profits, and registered as members of the company; and when the shareholders should be paid off under

(*g*) *Strachan's Case*, 16 S. J. 572 (Alb. Arb.). *Hummel's Case*, 16 S. J. 65 (Alb. Arb.).

(*h*) *Hummel's Case*, 16 S. J. 65 (Alb. Arb.).

(*i*) *Reed* v. *Cole*, 3 Burr. 1513.

(*k*) *Hummel's Case*, 16 S. J. 65, 68, (Alb. Arb.). Re *Albion Life Ins. Co.*, 16 Ch. D. 83, 49 L. J. Ch. 593, 43 L. T. N. S. 523, 29 W R. 109. Re *Great Britain Mutual Life*, 16 Ch. D. 247, 43 L. T. N. S 684, 29 W. R 202. *Bath's Case*, 11 Ch. D. 386, 48 L. J. Ch. 411, 40 T. L. N. S. 453, 27 W R. 653.

the scheme provided for, then the company was to consist of assurance members only, it was held that the policy-holders were contributories, but that they could not be called upon to contribute until the shareholders had been exhausted (*l*).

How companies' funds to be applied. Fund for payment of [* 390] *losses.*—"The capital stock of an incorporated insurance *company is not the primary or natural fund for the payment of losses which may happen by the destruction of the property insured. The charter of the company contemplates the interest on the capital fund and the premiums received for insurance as the ordinary fund out of which losses are to be paid. *What are surplus profits.*—And the surplus of that fund, after paying such losses, is surplus profits within the meaning of the charter, which surplus profits alone are to be distributed from time to time among the stockholders (1). The unearthed premiums received by the company, upon which the risks are still running, and which may therefore all be wanted to pay losses which may happen upon those risks, and not surplus profits, which the directors are authorized by the charter to distribute among the stockholders. *Capital stock available for extraordinary losses.* The capital stock of the company if a special fund provided by the charter to secure the assured against great and extraordinary losses which the primary fund may be found insufficient to meet. *Drafts on special funds to be made good.*—And if it becomes necessary at any time to break in upon this special fund to pay such extraordinary losses, it must be made good from the future profits of the company before any further dividends of those profits can be declared.

Whole of premiums, &c., must not be divided.—The directors of an insurance company are not justified in dividing all the interest or premiums in hand at the time when a dividend is declared, but should always leave a surplus fund in addition to the capital stock sufficient to meet probable losses on risks undertaken and unexpired (*m*).

Where directors liable for undue distribution of funds.—And if they abuse their discretion by such premature division, if an extraordinary loss arises, they may make themselves personally liable where the capital stock is more than exhausted by the amount of losses.

If they neglect to divide the profits without reasonable or [* 391] probable cause, they may be compelled to do so *so long as the company is solvent. But after insolvency it would be highly inequitable to take the surplus fund and divide among

(*l*) *Winstone's Case*, 12 Ch. D. 2[illegible]9, 48 L. J. Ch. 607, 40 L. T. N. S. 838, 27 W. R. 752.

(*m*) *Scott* v. *Eagle Ins. Co.*, 7 Paige (N. Y. Ch.) at 203

[1] Policy-holders who contributed to surplus fund are entitled to proportion of profits, even if they do not continue to be policy-holders at period of distribution. *Smith* v. *Hunterdown County Mut. F. Ins Co*, 41 N. J. Eq. 473. See *Carlton* v. *Southern Mut. Ins. Co*, 72 Ga. 371.

the stockholders, and leave the insured, whose premiums had increased that fund, to sustain a loss (*n*).

Right of interference where affairs of company mismanaged.—A policy-holder has not the least right to interfere with anything whatever which is done under the provisions of the deed of settlement, even in the case of the funds being invested on any improper investments, and it would be most mischievous to allow any such interference on his part with the management of the business by the directors. But if the funds of the company are about to be applied wholly regardless of the deed of settlement, he is entitled to ask the court to restrain such application. But to enable him to do so, there must be clear, distinct, and positive injury threatened to the fund which was available for his claim (*o*).

From what time policy-holder's charge on company's funds operates.—A policy-holder's charge, if any, on the funds of the company which has granted the policy, does not operate on the fund charged at the date of its issue, but at the moment when it becomes a claim, otherwise no dividend could ever be declared. When it does become a claim, it takes priority from the date when it became such, not from the time when it was payable.

When company's liability arises.—In a re-insurance life policy the liability arises on proof of death and of payment by the insurers under their original policy (*p*).

Right to receiver.—Even when there is no charge, it seems the policy will give a right to a receiver (*q*), but not give priority over general creditors (*r*).

**Suit maintainable by policy-holder in mutual society for contribution to his loss.*—A suit in equity can be maintained by [*392] a member of a mutual insurance society against the managing committee to recover by a contribution among the members the amount of his loss (*s*).

Liability of company to policy-holders. How limited.—The liability to policy-holders, &c., may be limited—

(1) By the constitution of the company.

(2) By particular provisions in the policy.

Where the limitation is effected by (1), no notice thereof need appear on the policy, since all who deal with companies are now

(*n*) *Scott* v. *Eagle Ins Co.*, 7 Paige (N. Y. Ch.) 188, 208. See *Nicholson* v. *Nicholson*, 9 W. R. 677.

(*o*) *Aldebert* v. *Leaf*, 1 H. & M. 681, 10 L. T. N. S. 185, 12 W. R. 462, 8 N. R. 455.

(*p*) Ex parte *Prince of Wales Society*, Johnson 633, 28 L. J. Ch. 335, 32 L. T. 195, 7 W. R. 137, 300.

(*q*) *Law* v. *London Indisputable*, 1 K. & J. 223, 24 L. J. Ch. 196, 22 L. T 208, 3 W. R. 155, 1 Jur. N. S. 179. Re *Athenæum Fife*, Ex parte *Eagle Co.*, 4 K. & J. 549, 27 L. J. Ch. 829, 6 W. R. 779.

(*r*) Re *State Fire*, 1 De G. J. & S. 634, 34 L. J. Ch. 436, 8 L. T. N. S. 146, 11 W. R. 1011. Re *English and Irish Church Co.*, 1 H. & M. 85, 11 W. R. 681, 8 L. T. N. S. 724.

(*s*) *Hutchinson* v. *Wright*, 25 Beav. 444. *Robson* v. *M'Creight*, Beav. 272, 27 L. J. Ch. 471, 31 L. T. 21, 6 W. R 385, 4 Jur. N. S. 269.

deemed to have notice of their constitution. And when a company alters itself duly from an unlimited to a limited, as may now be done under the provisions of the Companies Act, 1862, it becomes thenceforth needless to insert any provision in the policy, the addition of the word "limited" to its style being sufficent. Moreover, in case of such change provisions in the deed of settlement as to inserting such limitation in the policies become superfluous and can be struck out.

Liability of shareholders and funds may be limited by policy.—By the Companies Act, 1862, s. 38, sub-s. 6, it is provided that nothing within the Act shall invalidate any provision in a policy or other insurance contract limiting the liability of individual members on such policy, or making the funds of the company alone liable in respect of such policy or contract (*t*).

In all policies it is usual, if not invariable, and except in [* 393] limited companies necessary, to stipulate that the *funds of the insurance company shall alone be liable, and that individual shareholders shall be excepted from all personal liability.

Funds include unpaid calls.—Unpaid calls come within the definition of funds (*x*). When liability is limited to the funds, it means to the funds as they ought to be made up, and includes the still unpaid portion due on shares taken (*y*).

Liability undertaken by policy ultra vires.—The Hull and London Fire Assurance Company was registered under 7 & 8 Vict. c. 110. Its deed of settlement took power to grant marine insurances, but clause 77 thereof specially required that the funds of the company should alone be made liable, and s. 44 of the Act that policies should be signed by two directors or an officer expressly authorized thereto by resolution applying to the particular case. A policy issued without any qualification as to liability was held *ultra vires*, and such as could not be granted either by the directors, or any agent appointed by them (*z*), and nothing could be recovered thereon. But possibly the grantee may insist on having proper and *intra vires* policies granted to him (*a*). And in support of this view it may be observed that a memorandum, signed by three directors, stipulating that on receipt of certain premiums the company would guarantee an assurance, and issue, if required, a stamped policy in the authorized form, has been held binding on the company and to create a good equitable debt (*b*).

(*t*) See per Jessel, M. R., Re *Accidental Death Co.*, 7 Ch. D. 568, 47 L. J. Ch. 396, 26 W. R. 473.

(*x*) *Bowes* v. *Hope Society*, 11 H. L. C. 389, 397, per Lord Westbury. *Coghlan's Case*, 17 S. J. 127.

(*y*) *Evans* v. *Coventry*, 5 De G. M. & G. 911, 2 Jur N. S. 557, 25 L. J. Ch. 489, 4 W. R. 466, affd. 8 De G. M. & G. 835, 3 Jur. N S. 1225, 26 L. J Ch. 400, 5 W. R. 436.

(*z*) *Hambro* v. *Hull and London Fire Co.*, 3 H. & N. 789, 28 L. J. Ex. 62.

(*a*) *Ibid.* *Penley* v. *Beacon Fire Co.*, 7 Grant (U. C.) 130. *Wright* v. *London, &c., Co.*, 5 Canada (S. C.) 466.

(*b*) In Re *Athenæum Life Co.*, Ex parte *Eagle Co.*, 4 K. & J. 549, 25 L. J. Ch. 829, 5 Jur. N. S. 1140, 6 W. R. 779.

Where no debt can be established and the contract *is [* 394] wholly *ultra vires*, being on risks not allowed by the articles, policy-holders cannot claim as creditors, but only for premiums paid (*c*).

Policy-holder cannot control property or funds.—The grantees of policies insurance bargain to receive a sum of money to be paid in a future event. Whatever may be the property possessed by the grantors, the grantees have not by this contract any immediate control over it, or lien upon it. The grantors or their trustees continue to have the entire control or management over the whole fund. The real estate or chattels real may be sold and converted into pure personalty, and pure personalty may be converted into chattels real, and this state of things may continue not only during the contingency upon which payment depends, but after the contingency has determined, for the grantee acquires no specific lien after the payment has become due. Even in default of payment when due, the grantee cannot by reason of such default only resort immediately and at once to chattels real, but must resort to legal process, which will not affect the land possessed by the insurers at the time of the contract, although it may in its final result affect such land as the office may have at the time when the process is executed. Ordinarily the grantee has nothing but a right of action from the date of the contract until payment (*d*).

Policy-holder not secured creditor.—From this it results, on the one hand, that a policy is not within the Mortmain Acts, and on the other that a policy-holder under such a policy would not be a secured creditor in case of liquidation.

Provision in policy creating a charge from proof of death.—But where a life policy was granted stipulating that the funds remaining at the time of any claim or demand unapplied an undisposed of, and inapplicable to prior *demands, should be liable to [* 395] answer the demand, and negativing individual liability on the part of the directors, it was held that this constituted a charge on the funds, and that it took priority from the date of proof of death although not payable until three months later (*e*).

Company not a trustee of policy money on death of assured who has assigned.—An insurance company which has granted an ordinary policy of life iusurance is a debtor, and an assignee of such policy becomes, on the death of the life insured, a creditor of the company. The company is not in such case a trustee or a stakeholder, and should not pay the policy money into court under the Trustee Relief Act (*f*).

What amounts to covenant to pay out of particular funds.—No pre-

(*c*) Re *Phœnix Life, Burgess and Stock's Case*, 2 J. & H. 441, 31 L. J. Ch 749, 10 W. R. 816.

(*d*) *March* v. *Attorney General*, 5 Beav. 433, per Lord Langdale.

(*e*) Re *Athenæum Life, &c., Co.*, Ex parte *Prince of Wales Co.*, Johnson 633, 28 L J. Ch. 335, 32 L. T. 195, 7 W. R. 137, 300

(*f*) *Matthew* v. *Northern, &c., Co*, 9 Ch. D. 80, 38 L. T. N. S. 468, 45 L. J. Ch. 562. *Desborough* v. *Harris*, 5 De G. M. & G. 439.

cise or technical words are necessary to create a covenant; and whether it be so or not depends on the intention of the parties, and therefore where directors had stipulated that neither of them as directors should be liable to any demand for loss, except under the articles of the society, it was held that the instrument might be considered as a covenant to entitle the insured, in case of a loss by fire, to receive a remuneration out of the funds of the society to the extent of such funds (*g*).

"The capital stock," "the capital stock and funds," "the stock and funds," "the capital stock and effects," with or without reference to prior claims, or limitation of the charge to the amount of such capital stock funds or effects undisposed of and inapplicable to prior claims under the constitution of the company, are variously made liable in the policies of unlimited companies (*h*).

[* 396] No charge is created on the funds of a company by *the terms of a policy which makes the stock and funds of the company liable alone. *Policy making funds solely liable does not create charge, and holders rank with general creditors.*—Consequently the holders of such policies have no claims on the assets of the company in preference to general creditors (*i*).

Effect of provision that funds shall make good specified sums.—A provision in a policy, that the capital stocks and funds of the said company shall be subject and liable to make good the aforesaid sum of £ to the assured, his heirs, executors, or assignees, means that the money shall be paid—*i. e.*, that the stock shall be applied in the payment, or that the company shall pay it out of the stock—it does not amount to an equitable assignment of the stock, but is merely a covenant to pay out of stock so far as it will go (*k*).

Where policy restricts claims to property of company, shareholder can't be sued.—Where a policy restricts claims under it to the property of the company remaining at the time of any claim, including unpaid capital and specially excepts all individual liability, the assured cannot proceed at law against an individual shareholder; and it will not help the policy-holder that the deed of settlement contains (if it does) terms more favourable to the assured than the policy does, nor that the capital stock is fraudulently overstated in the policy (*l*).

So also where the liability is imposed upon the funds remaining unapplied and indisposed of and inapplicable to prior claims (*m*).

Liability limited by policy can't be extended by action for breach of contract.—Where the liability of shareholders in an insurance com-

(*m*) Re *Athenæum Life*, Ex parte *Prince of Wales Life*, *supra*, note (*e*).

(*g*) *Andrews* v. *Ellison*, 6 Moore (C. P.) 199.

(*h*) Re *State Fire*, 9 L. T. N. S. 108.

(*i*) Re *State Fire*, 9 L. T. N. S. 108; and see Re *International Life*, *M'Iver's Claim*, 5 Ch. App. 424, 23 L. T. N. S. 88, 18 W. R. 794.

(*k*) *Matthew* v. *Northern*, 9 Ch. D 80, 84, 38 L. T. N. S. 468, 45 L. J. Ch. 562.

(*l*) *Durham's Case*, 4 K. & J. 517 (1858.)

pany is by provisoes in the policy limited (in case of insolvency) to the amount then unpaid in such shares, the policy-holders cannot, by bringing action for breach of contract, in effect make the liability *unlimited (*n*). To do so would enable persons [* 397] who have contracted to seek their claims from a certain limited fund to enforce them agninst another and unlimited fund. Policy-holders under such policies have no personal remedy (*o*).

Where liability limited by policy, covenanted to indemnify is also limited.—Where such is the case a covenant to indemnify is not unlimited in its scope, and does no more than bind and affect the paid and unpaid capital of the indemnifying insurer (*p*).

Nor can the policy-holders get the costs of winding up out of contributories who have compounded under s. 160 of the Act of 1862 and the Rules of 1862, sched. iii., form 56 (*q*).

Funds appropriated to secure policy-holders must be reserved for them. Costs of getting in funds appropriated to policy-holders to be borne by shareholders.—If the liability of shareholders be limited by the policies (or in other manner whereof the policy-holders have notice) to the subscribed capital of the company, the funds thereby indicated must be kept entirely for the policy-holder (*r*), and the costs of getting in the unpaid capital, which is hypothecated in this manner to the claims of the policy-holders, will fall not on them, but on the shareholders, since such costs are really costs of settling the matter between the joint-stock partners themselves (*s*).

But the policy-holders cannot insist on further calls after [398] exhaustion of assets to recoup them for assets spent in paying general creditors, neither will they be postponed to general creditors, but will rank with them (*t*).

The deed of settlement of the Albion Insurance Company provided that before any dividend was declared a reserve of not less than two per cent. of the annual interest of the sums advanced should be appropriated until the whole capital (of £1,000,000) should be raised as a permanent fund to provide against losses.

(*n*) *Lethbridge* v. *Adams*, 13 Eq. 547, 26 L. T. N. S. 147, 20 W. R. 352.

(*o*) Re *Professional Life*, 3 Ch. App. 167, 17 L. T. N. S. 631, 36 L. J. Ch. 442, 16 W. R. 295. Re *Athenæum Life*, 3 De G. & J. 660. *Durham's Case*, 4 K. & J. 517. *Bell's Case*, 9 Eq. 706–712, 39 L. J. Ch. 539, 18 W. R. 784. *Evans* v. *Coventry*, 8 De G. M. & G. 895, 26 L J. Ch. 400, 5 W. R. 436. *King* v. *Accumulative Life Co.*, 3 C. B. N. S. 151, 163, 27 L. J. C. P. 57, 30 L. T. 119, 6 W. R. 12. *Aldebert* v. *Leaf*, 1 H. & M. 681, 10 L. T. N. S. 185, 12 W. R. 462. *Hallett* v. *Dowdall*, 18 Q. B. 2, 16 Jur. 462.

(*p*) *Frere's Case*, 16 S. J. 502, per Lord Cairns, disapproving *Fleming's Case*, but *Fleming's Case* is of judicial authority.

(*q*) Re *Accidental Death Co.*, 7 Ch. D. 568, 47 L. J. Ch. 397, 25 W. R 473.

(*r*) Re *Professional Life Co.*, *ubi supra*. *Hallett* v *Dowdall*, *ubi supra*.

(*s*) Re *Agriculturist Cattle Insurance Co.*, 10 Ch. App. 1, 44 L. J. Ch. 108, 31 L. T. N. S. 710, 23 W. R. 219. Re *Arthur Average Co*, No 2, 24 W. R. 514. Re *Professional Life Co.*, 3 Ch. App. 167, 36 L. J. Ch. 442, 17 L. T. N. S. 631, 16 W. R. 295, 1867. Re *London Marine Ins. Co.*, 8 Eq. 176, 17 W. R. 784.

(*t*) Re *English and Irish Church Co.*, 20 L. T. N. S. 943, 8 L. T. N. S. 724, 1 H. & M. 79, 11 W. R. 681. Re *State Fire Co.*, 11 W. R. 746, 1011, 24 L. J. Ch. 436, 1 De G. J. & S. 634, 8 L. T. N. S. 146.

The funds were accumulated, though no reserve fund was actually set apart, and bonuses were triennially divided. *Reserve fund is capital.*—The Albion amalgamated with the Eagle, and each shareholder was given the option of receiving £50 a share, or having an allotment of shares and receiving a share of the surplus assets. *Bonus therefrom is income.*—It was held, in a question on a settlement comprising some Albion shares, that the share of the surplus assets was capital, since the surplus assets were a reserve fund, and not income, though the triennial bonus, coming out of the same fund, seems to have been treated as income (*u*).

Bonus chargeable with income tax.—And where a life insurance company issued "participating policies," according to the terms of which the gross profits of such policies were divided quinquennially as follows—viz., two-thirds to the holders of such policies then in force, and the remaining third to the company, which bore the whole expenses of the business—the portion remaining after payment of expenses constituting the only profit available for division amongst the shareholders, the House of Lords decided (Lord Bramwell dissenting) that the two-thirds returned [* 399] *to the policy-holders were "annual profits or gains," and assessable to income tax (*x*).

Payment must be made before winding up, to avoid fraudulent preference.—Where a claim on a policy was sent in with proofs and admitted, and a day fixed for payment, but before that day a petition was presented for the winding-up of the company, upon which after several adjournments a winding-up order was seven months subsequently made, Lord Romilly held that payment by the company of the claim must be deemed a fraudulent preference within s. 153 of the Companies Act, 1862, and that the money must be refunded (*y*).

In other words, it is not enough that the right to the policy-moneys should have accrued. Payment must be made before any winding-up proceedings (*z*).

Annuitants are creditors from day annuity begins to run.—Holders of annuities granted by insurance companies are creditors of the company from the day when the annuity begins to run. The liability of the company may be limited by its constitution or the terms of the annuity deed; and whether the annuity is a secured debt or not depends on like considerations. They can of course prove in the liquidation of the company for the value of the annuity (*a*) which is to be computed.

Fund set apart for immediate claims.—Where a trust fund is set apart by a company to meet immediate claims on policies, &c, it

(*u*) *Nicholson* v. *Nicholson*, 9 W. R. 677.
(*x*) *Last* v. *London Assurance Corporation*, 10 App. Cas. 438, 55 L. J. Q. B. 92, 53 L. T. 634, 34 W. R. 233.
(*y*) *Browne's Case*, 16 S. J. 781 (1874).
(*z*) *Martin's Claim*, 14 Eq. 148.
(*a*) *Hunt's Case*, 1 H. & M 79, 7 L. T. N. S. 669, 11 W. R. 225.

covers only those claims and demands which have so matured that immediate payment can be demanded and an action at law brought, or other immediate steps taken to obtain payment. An annuity which had matured, but on which no installments were due within the time limited for immediate payments, will not rank on such fund (*b*).

**Loan by office on security of land and policy, value of policy* [* 400] *can't be set off against debt.*—A man who borrowed from an insurance company on the security of a policy granted by them and of a charge on land, on the liquidation of the company was held liable to the assignees of the debt and securities for the amount of the loan, and unable to set off the value of the policy, or to claim indemnity in respect of subsequent depreciation of the policy, the assignees being ready to return all the securities given for the debt on receiving payment thereof (*c*).

Value of policy can't be set off against loan on it in liquidation of company.—Nor if a man borrows on his policy can he set off the value thereof against the loan in the liquidation of the insurance company (*d*). But under the present law a policy has an ascertainable value in liquidation (*e*).

Value of policy can't be set off on bankruptcy of policy-holder against loan on security of policy.—The sum at which a policy has been valued in the winding-up of an insolvent insurance company is not a debt due within the mutual credit clause of the Bankruptcy Act, 1869, s. 39 (unaltered in the Act of 1883, *vide* s. 38) (*f*), and therefore cannot be set off under the bankruptcy of a policy-holder against a loan made to him on the policy.

Limited liability to policy-holders does not affect general creditors.—A limit placed on the liability to policy-holders by the deed of settlement, does not in any way affect the rights of general creditors, who will have in such a case the unlimited liability of the shareholders, and not be restricted to the capital of the company, if the company be not a limited liability (*g*).

Rights of annuitants and non-participating policy-holders depend on their contracts.—The rights of annuitants and non-participating policy-holders depend on the presence or absence of limitation or qualification in the annuity contracts or policies accepted by them (*h*).

**Questions arising on winding up.*—In the winding up of [* 401] an insurance company, the important questions for consideration are—

(*b*) *Wyatt's Case*, Reilly (Alb. Arb.) 42.

(*c*) *Bourne's Case*, Reilly (Alb. Arb.) 44.

(*d*) *Parlby's Case*, Reilly (Alb. Arb.) 48.

(*e*) Life Assurance Companies Act, 1870.

(*f*) Ex parte *Price*, Re *Lankester*, 23 W. R. 844, 33 L. T. N. S. 187.

(*g*) Re *Accidental Death Co*, 7 Ch. D. 568, 47 L. J. Ch. 396, 25 W. R. 473.

(*h*) Re *Kent Mutual Company, Hummel's Case*, 16 S. J. 65, 68 (Alb. Arb.).

(1) The number of matured claims or contracts on which a present liability exists.

(2) The number of immature claims whereon the liability is still contingent.

(3) Whether all claims are payable out of the same funds.

(4) If not, whether any claims are secured or come in only with claims of general creditors.

How claims valued.—Under the present law in the winding up of an insurance company—(1) matured claims or policies are valued at the amount, including accrued bonus, which was payable on them at maturity; (2) immature claims are valued in accordance with the first schedule to the Life Assurance Companies Act, 1870; (3) annuity contracts are valued under the second schedule of the same Act.

Reduction of contracts in lieu of winding up.—By the Life Assurance Companies Act, 1870 (*i*), the Court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding up order (*k*).

(*i*) 33 & 34 Vict. c. 61, s. 23.

(*k*) Re *Britow Medical, &c., Co.*, 54 L. T. 14.

*CHAPTER XXII. [*402]

NOVATION AND AMALGAMATION.

Definition.—By novation is meant a tripartite arrangement whereby a debtor or person liable presently or in future, or on a contingency or concurrence of contingencies, is released from such debt or liability in consideration of his providing another person who will undertake to satisfy such debt or liability (*a*). *Difference between novation and suretyship.*—The creditor, by consenting to such arrangement, consents to look only to the new debtor; and it is the criterion between novation and suretyship that in the former the creditor has no right of recourse to his original debtor (*b*), having accepted the new liability in complete extinction and satisfaction of the old, whereas in suretyship the liability of the original or principal debtor continues.

Novation to be proved.—The law will not presume novation (*c*). It is a question of fact, and must be proved accordingly by those who aver it to have taken place (*d*). In the absence of such proof the new liability, if any, will be taken to be by way of guarantee (*e*), and not as a substitute for the old.

Proof required.—Although very slight evidence is sufficient in the course of dealing between a customer and a firm, subject to change by the retirement of old partners and the introduction of new, to show that the customer continuing his dealings accepts the new firm as his debtors *in lieu of the older firm [*403] (though even when it is necessary that knowledge of the change in the firm should be brought home to the creditors), far more precise and cogent proof is required to show that in the case of two limited liability companies, formed originally under separate deeds, a creditor has abandoned a written definite contract with one company for an unwritten engagement by a new company, to be arrived at through the medium of very special arrangements between the two companies (*f*).

Novation not solely applicable to insurance.—The doctrine of novation does not apply solely to insurance, but owing to the recent

(*a*) 1 Pothier (Evans'), p. 381, 546. *Wilson* v. *Lloyd*, 16 Eq. 60.
(*b*) 1 Pothier (Evans'), p. 394, s. 568.
(*c*) 35 & 36 Vict c. 41, s. 7. *Bowring's Case*, 16 S. J. 305.
(*d*) *Coghlan's Case*, Reilly (Eur. Arb.) 46, 17 S J. 128. *Blundell's Case*, Reilly (Eur. Arb.) 84, 17 S. J. 594.
(*e*) Erskine's Scottish Law 425.
(*f*) Re *Family Endowment Co.* per Hatherly, C, 5 Ch. App. 118, 132–3, 39 L. J. Ch. 306, 21 L. T. N. S. 775, 18 W. R. 266.

history and peculiar character of insurance business, has been chiefly discussed of late years with reference to insurance companies, having been brought into prominence by the result of numerous and complicated amalgamations and transfers of business between insurance companies which were in difficulties at the time of such amalgamations and ultimately became insolvent.

But many cases have arisen out of arrangements of insurance companies.—A large number of companies, by a series of successive amalgamations and transfers, were ultimately merged in the European and Albert Companies respectively, and both failed, upon which it became necessary to decide—(1) the competency of the various companies to effect the said amalgamations and transfers; (2) whether such proceedings, if competent to the company, were binding on its policy-holders and other creditors; (3) whether, if not binding, they had been accepted and acted upon by creditors. These questions are dealt with in the following pages on novation and amalgamation.

Amalgamation.—By amalgamation or transfer is meant [* 404] those *arrangements between insurance companies on occasions when one takes to the business of the other (*g*).

Amalgamation ultra vires.—Purchase by one insurance company of the goodwill and the whole concern of another will, ordinarily speaking, be a transaction in which no insurance company will be justified in engaging, because it certainly cannot be said to be within the ordinary scope of the objects of any company to purchase the goodwill of another (*h*). Such a transaction may, however, be expressly authorized under the deed of settlement or other instrument constituting the company, but the purchase must be carried out according to the provisions thereof (*i*).

Capacity to amalgamate must be expressly shown.—Power to enter into a contract of amalgamation is most clearly no part of the general powers which the law would imply in directors of an insurance company (*k*). The power to insure lives and the power to grant annuities on lives committed to the directors of an insurance company, implying as it does skill and care on their part in selecting lives, could not be contended to authorize the taking over in mass by the executive of one insurance company of all the insured lives and all the annuity contracts of another company selected and entered into, not by the executive of the first company, but of the other (*k*). In order, therefore, to maintain a contract of amalgamation or any rights of indemnity arising therefrom, the power to amalgamate must be shown and strictly pursued, and general principles of law, which would show that, in the ordinary details of business in obtaining necessaries and entering into contracts for

(*g*) *Indemnity Case*, Reilly (Alb. Arb.) 17.
(*h*) *Ernest* v. *Nichols*, 6 H. L. C. 401, 414. Re *Era Insurance Co.*, 30 L. J. Ch. 137, 8 L. T. N. S. 314, 6 Jur N. S. 1334, 9 W. R. 67 (1861).
(*i*) *Ernest* v. *Nichols*, 6 H. L. C. 401.
(*k*) *Indemnity Case*. Reilly (Alb. Arb.) 25.

them, the directors would have power to bind their shareholders, whether *their shareholders had or had not stipu- [* 405] lated for particular limits of liability in the deed, cannot be appealed to in order to support an amalgamation or an undertaking to indemnify as part of a contract of amalgamation (*l*).

Amalgamation ultra vires can be ratified.—But an amalgamation which is at its outset *ultra vires* may be ratified and accepted by the shareholders with or without qualification; and Lord Cairns, as arbitrator, held that the Albert Society, in sanctioning an amalgamation effected by its direction did not accept certain *ultra vires* terms in the amalgamation deed which purported to impose on them an unlimited liability in respect of the debts of the amalgamated companies (*m*).

When power to amalgamate not given by deed, it may be by special resolution.—When the original deeds constituting the company do not give the power to amalgamate, such power may be given by general resolution, but not so as to alter the fundamental principle of the original deed as to the individual liability of shareholders (*n*). Therefore an amalgamation purporting to do more will be void (*o*), though an amalgamation not altering the nature of such liability will be good (*p*).

So no amalgamation could be *intra vires* which, in the face of a clause in the original constitution of the company, requiring that in every contract there shall be inserted a limitation of liability, purports to bring upon the company a liability not so limited (*q*). But Lord Romilly held that where amalgamation was *authorized, the covenant to indemnify made thereon was [* 406] unlimited (*r*).

Policy-holder accepting amalgamation can only claim on amalgamating company.—When a policy-holder or annuitant of one insurance company accepts an amalgamation of his company with another company, he can only claim on such other company as if he had originally obtained policies or annuities from that company (*s*).

Claim by amalgamated on amalgamating company when policy-holders will not look to amalgamating company.—And when the policy-holders and annuitants will not look to the amalgamating company, the amalgamated companies can under the deed of amalgamation and indemnity only claim on the assets of the other with general creditors, or, in other words, the indemnity will be limited.

(*l*) *Indemnity Case*, Reilly (Alb. Arb.) 25.
(*m*) *Ibid.*, 28.
(*n*) *Ibid.*, 29.
(*o*) *Albert Co.* v. *Bank of London Co.*, same case.
(*p*) *Albert Co.* v. *Medical*, p 28, same case.
(*q*) *Indemnity Case* (*No.* 2), Reilly (Eur. Arb.) 3. *Anglo-Australian Co.* v. *British Provincial Co.*, 3 Giff. 521, 6 L. T. N. S. 68, 517, 10 W. R. 588. Ex parte *Smith*, Re *Anglo Life Co*, 8 W. R. 170. Ex parte *Anglo-Australian Co.*, Re *British Provincial Co.*, 10 L. T. N. S 826, 12 W. R. 701.
(*r*) Re *British Provident Co.*, 18 S. J. 242 (Eur. Arb.).
(*s*) *Indemnity Case*, Reilly (Alb. Arb.) 33, 16 S. S. 141.

Costs of liquidation of amalgamated company through default of amalgamating company.—The costs of liquidating the amalgamated companies in consequence of the default of the amalgamating companies will be treated like the costs of a surety who resists the creditor's claim when the principal debtor fails to pay it, and they must show very strong reasons for resisting before they can be entitled to such costs (*t*). If the indemnity includes costs when ascertained and proved to result from breach of the covenant to indemnify, they may be charged on the company promising the indemnity (*u*).

When policy-holder bound by transfer of liability of office.—Policy-holders can only be made to consent to a transfer of the liability on their policies—(1) when power to effect such transfer is expressly given by the constitution of the company granting the policies, and (2) if the provision regulating the mode of such transfer have been strictly complied with. But to avoid risk of acquiescence or novation, it is advisable to signify dissent or protest (*x*); and [* 407] where either is effectual, by formal *protest (*y*) to pay premiums and do other acts needful to keep alive the claim with reference to such protest. Unless such protest be absolute, or declared to be in force until certain acts are done, or information is given by the person to whom it is addressed, difficulties may still arise, and subsequent acquiescence be alleged with some show of reason (*z*).

Novation. Lord Cairns' view.—Where persons having claims by way of policy or annuity, deed, endowments, or otherwise, allow themselves to drift into dealings and enter into relations with the new company, and to pay premiums, &c., and make no protest with regard to the footing upon which they are paying these premiums, &c., they lose the security of the old company and become creditors of the new (*a*).

Amalgamation without policy-holders losing rights against transferor company.—Where a company transfers its business to another in consideration of a covenant by the transferee company to indemnify the transferor against all claims on policies, annuities, and other contracts, holders of annuity contracts with the transferor company, who were also shareholders, by exchanging those shares for an equivalent number in the transferee company, do not preclude themselves from looking to the transferor company for the payment of the annuity (*b*).

By assenting to the exchange they do no more than agree that

(*t*) *Ibid*, 84.
(*u*) *Indemnity Case*, (*No.* 2), Reilly (Eur. Arb.) 8.
(*x*) *Wood's Case*, Reilly (Alb. Arb.) 54, 15 S. J. 693.
(*y*) *Wood's Case*, Reilly (Alb. Arb.) 54, 15 S. J. 693, for a very clear and well-drawn protest.
(*z*) *Dorning's Case*, Reilly (Alb. Arb.) 144. *Griffith's Case*, 6 Ch. App. 374, 40 L. J. Ch. 464, 24 L. T. N. S. 458, 19 W. R. 495.
(*a*) *Dorning's Case*, Reilly (Alb. Arb.) at 148.
(*b*) *Frere's Case*, Reilly (Alb. Arb.) 211.

the paid and unpaid portion of the transferee company's capital, including their own portion thereof, shall be available to indemnify the old company in respect of the old debts. They do not merge or extinguish their own claims against the old company (*c*).

**Where company dissolved, &c., liability of partners continues, unless specially discharged.*—If a person takes shares in an insurance company, and then that company is dissolved, or its business transferred to or amalgamated with that of another such company, unless the dissolution, transfer, or amalgamation involves a discharge to the creditors of the dissolving, &c., company which binds them, the liability of the partners continues. Unless they accede to the transfer, however conformable it may be to the constitution of the companies engaged in it, they are not bound. But if they accept the indemnity of the new company, the old liability ceases (*d*). [* 408]

Rights of creditors, &c., of transferor company preserved.—When one company transfers to another its business, the transferee company promises by the deed of transfer indemnity to the transferor against all claims of policy-holders or creditors with vested or contingent rights against the transferor. This of itself does not in any way debar such creditors from suing the transferors. If the transferees continue solvent, the transferor can have recourse to them, by claim over. Most of the cases on this point have arisen where creditors of the transferors have found the transferees insolvent.

Covenants to indemnify not unlimited.—Covenants to indemnify, made by insurance companies with each other on amalgamation and transfer of business, are not unlimited in their scope. They do no more than affect and bind the paid and unpaid capital of the indemnifying company. And the assent of a shareholder to an indemnity covenant amounts to nothing more (*e*).

Position of Shareholder.—An insurance company agreed to amalgamate with a second company, and a deed in two parts embodying the terms of amalgamation was drawn up and executed, but subsequently declared void for a variation between the terms of the two parts (*f*). A shareholder in the *first company applied for shares in the second, and received a letter of allotment, but no certificate of shares. As he did not accept the allotment, it was held that he could not be called upon to contribute in the winding up of the second company, but must be treated as an applicant for shares which never had been alloted, the insertion of his name on the register being neither authorized [* 409]

(*c*) *Fleming's Case*, 6 Ch. App. 393, 39 L. J. Ch. 250, 23 L. T. N S. 770, 19 W. R. 663.

(*d*) *Lancy's Case*, Reilly (Eur. Arb.) 18 per Lord Westbury.

(*e*) *Indemnity Case*, Reilly (Alb. Arb.) 17. *Frere's Case*, 16 S. J 502, Reilly (Alb Arb.) 211. *Fleming's Claim*, 6 Ch. App. 393, 19 W. R. 663, 23 L. T. N. S. 770, 39 L. J. Ch. 250.

(*f*) *Wynne's Case*, 28 L. T. N. S. 805, 21 W. R. 895.

nor ratified by him (*g*). *Void amalgamation.*—The amalgamation being void, there was no consideration for taking shares in the second company, since that company could not give him shares on which he was to be credited with the value of his old shares, and as a fact no agreement to take the second company's shares was proved (*h*).

No amalgamation of life offices without consent of High Court.—Life insurance companies cannot now amalgamate or transfer their business without the assent of the High Court of Justice, to be obtained by petition in the Chancery Division (*i*).

It may be stipulated that policy-holder shall accept liability of transfer company.—It is quite lawful (*k*) to make it a term of the original contract of insurance that the holder thereof shall be obliged to accept any subsequently substituted liability created by any *intra vires* transfer or amalgamation. This may be done by express and apt words in the policy, or by declaring the policy to incorporate and be subject to the constitution and bye-laws of the company (*l*), but will in no case be implied by law (*m*).

If the amalgating companies are treated as separate, novation does not occur.—Where the terms of the amalgamation do or purport to keep the two companies separate, no question of novation can [* 410] arise, and holders of contracts with the *absorbed company continue to be creditors of that company alone (*n*).

The object of proving novation is to enable the old debtor to resist any recourse to him for payment of the debt. *Amalgamation ultra vires.*—An insurance company which has transferred its business *ultra vires*, or to a company which had not the power to take it over, or which, the transfer being *intra vires* on both sides, cannot by its constitution or the terms of its policies, or both, compel the contract-holders to look to the new company, is not entitled to dissolve, and may be resusticated for purposes of winding up when its contract debts fall due, unless it can prove that the contract-holders had full knowledge or sufficient notice of the arrangement (*o*) between the transferor and the transferee companies, and assented thereto in such a manner as to agree to look to the transferee company only for satisfaction (*p*) of the policy or other insurance contract when its amount became payable.

(*g*) *Beck's Case*, 9 Ch. App. 392, 43 L. J. Ch. 531, 29 L. T. N. S. 207, 22 W. R. 348, 460.

(*h*) Same case.

(*i*) 33 & 34 Vict. c. 61, ss. 14, 15.

(*k*) Pollock on Contracts 190. *Dowse's Case*, 3 Ch. D. 384, 46 L. J. Ch. 402, 35 L. T. N. S. 653, and *Cocker's Case*, 3 Ch. D. 1, 45 L. J. Ch. 822, 35 L. T. N. S. 290. *Hort's Case*, 1 Ch. D. 307, 45 L. J. Ch. 321, 33 L. T. N. S. 766.

(*l*) Brice Ultra Vires, p. 724, ccxxxix., discussed in Pollock on Contracts, p. 190.

(*m*) *Lancey's Case*, Reilly (Eur. Arb.) 18.

(*n*) Re *Anchor Ins. Co.*, Ex parte *Badenoch*, 5 Ch. App. 682, 18 W. R. 1188.

(*o*) *Conquest's Case*, 1 Ch. D. 334, 45 L. J. Ch. 336, 33 L. T. N. S. 762.

(*p*) Ex parte *Gibson*, Re *Smith, Knight & Co.*, 4 Ch. App. 662, per Giffard, L. J.

Shareholders of transferor company seek release from their policy-holders.—It is consequently of equal importance for the share-holders of a transferring company to induce the policy-holders to release them and accept the transferee, where the policy-holders have the option of refusal, and for the latter in such a case to avoid novation and seek to preserve recourse against the original grantors of the policies. Whether novation has or has not been made, being, as already said, a question not of law or presumption, but of fact, in the very complicated circumstances attending the amalgamation already alluded to, it is not surprising that the views of the Court of Chancery and Lords Cairns, Westbury, and Romilly, sitting as arbitrators in the winding up of the Albert and European Companies, are not wholly consistent (*q*). **Decisions of arbitrators not absolutely binding.*—The views of the learned arbitrators, however, though entitled to the greatest regard as opinions of very learned men, are not binding on the Courts. [* 411]

Payment of premiums not evidence of novation.—Payment of premiums necessary for the maintenance of the policy or other similar security to the transferee company is not sufficient to constitute novation (*r*). The act, being ambiguous, is not sufficient to raise a presumption against the policy-holders, who in cases of transfer can only pay at the transferee's office, and payment may be made them either as agents for the grantors of the contract or as principals.

Payment under protest will prevent novation.—Formal protest in writing, declaring that future premiums would be paid only subject to and on the foot of that protest, and prevent any question of lapse, is sufficient to negative novation (*s*).

A receipt from a company other than the original insurers may be explained by payment either as accepting the new company as futurers, or as agents of the original company (*t*), and, being ambiguous, will not prove novation.

Payment in ignorance of change.—If the holder of the receipts knew nothing of amalgamation, he cannot be held to have assented to it (*u*).

Without authority.—And if the premium be paid to the transferee company by the bankers of the contract-holder's widow, without the executor's authority, there is no novation (*x*). So if the contract-holder cannot read, and does not otherwise learn of the amalgamation, he will not be held to have accepted the liability of the amalgamating company (*y*).

(*q*) Lindley on Partnership 468.
(*r*) 35 & 36 Vict. c. 41, s. 7. And see *Bartlett's Case*, 5 Ch. App. 640; *Holditch's Case*, 14 Eq. 72, 26 L. T. N. S. 415, 20 W. R. 567.
(*s*) *Wood's Case*, Reilly (Alb. Arb.) 54, per Lord Cairns. *Dorning's Case*, Reilly (Alb. Arb.) 144. *How's Executors' Case*, Reilly (Alb. Arb.) 245.
(*t*) *Whitehaven Bank Case*, Reilly (Alb. Arb.) 62
(*u*) *Power's Case*, Reilly (Alb. Arb.) 232.
(*x*) *Dupre's Executors' Case*, Reilly (Alb. Arb.) 236.
(*y*) *Clegg's Case*, Reilly (Alb. Arb.) 266.

[* 412] *Acceptance of bonus *evidence of novation.*—But acceptance of a bonus from the transferee company is evidence of an intention to accept its liability in lieu of the liability of the transferor company (*a*). So will the carrying in of a claim against the transferee company, whether before (*b*) or in the winding up, be evidence of novation (*c*).

Indorsement of policy by transferee company.—Novation also takes place when the transferee company indorses the original policy with an acceptance of liability conditionally upon payment of premiums to it (*d*), and generally when a policy-holder has sent in his policy to be indorsed by the transferees, or to be exchanged for one of theirs (*e*), or accepts any voucher declaring their liability (*f*), novation is clear.

Verbal protest not sufficient to prevent.—Verbal protests by a policy-holder to an agent of his company will not suffice to prevent novation in face of other facts evidencing it (*g*). But complete protection if desired may be obtained by formal written protest and payment of premium subject thereto. A good instance of such protest is *Wood's Case* (*h*).

Where policy-holder is shareholder or party to deed of transfer.—Where a policy-holder is also a member or shareholder in the company whose business is transferred, and a party to the deed of transfer, novation will be held to have taken place as to his policy (*i*).

Novation by mortgagor binds mortgagee.—Where a policy is mortgaged, novation by the mortgagor will bind the mortgagee [* 413] (*k*). So also in the *case of a settled policy, if the settlor accepts the liabilities of the transferees, the trustees cannot claim against the transferors (*l*).

Receipt of annuity not sufficient.—The holder of an annuity contract which has not matured is in just the same position as a policy-holder. But when the annuity has become due, receipt of the instalments thereof without demur from a company other than

(*a*) Ex parte *Nunneley*, Re *Times Life and Guarantee Co*, 39 L. J. Ch. 275, 5 Ch. App 381, 18 W. R. 559. *Spencer's Case*, 6 Ch. App. 362, 40 L. J. Ch. 455, 24 L. T. N. S. 455, 19 W. R. 491.

(*b*) *Even's Claim*, 16 Eq. 354. *Knox's Case*, Reilly (Alb. Arb.) 132, *Allen's Case*, Reilly (Alb. Arb) 127.

(*c*) Re *National Provident Life Co.*, 9 Eq. 306. Re *International and Hercules Co*, Ex parte *Blood*, 9 Eq. 316, 39 L. J. Ch. 295, 22 L. T. N. S. 467, 18 W. R. 370.

(*d*) Re *European Co.*, *Miller's Case*, 8 Ch. App. 391.

(*e*) *Griffith's Case*, 6 Ch. App. 374, 40 L. J. Ch. 464, 24 L. T. N. S. 458, 19 W. R. 495.

(*f*) *Hawtrey's Case*, Reilly (Alb. Arb.) 138, 16 S. J. 713.

(*g*) *Rivaz's Case*, Reilly (Alb. Arb.) 104. *Howell's Case*, Reilly (Alb. Arb) 117, 16 S. J. 631. *German Life Co. Case*, Reilly (Alb Arb.) 189.

(*h*) Reilly (Alb. Arb.) 54.

(*i*) Ex parte *Stephens* 9 Eq 694, 22 L. T N. S. 264, 18 W. R. 725. *Fleming's Case*, 6 Ch. App. 393, 39 L. J. Ch 250, 23 L. T. N. S. 770, 19 W. R. 663. *Harman's Case*, 1 Ch. D. 326, 45 L. J. Ch. 336, 33 L. T. N. S. 760.

(*k*) *Werninck's Case*, Reilly (Alb Arb.) 101.

(*l*) *Andrew's Case*, Reilly (Alb. Arb.) 107.

the grantors will not amount to novation (*m*), since accepting from B. payment of a debt due by A. is no evidence that the recipient considers B. his debtor (*n*). In certain cases, however, the annuitant cannot resist novation. *Otherwise where deed of settlement provides that only funds of company liable.*—Thus, where the deed of settlement of the grantor company provides that its funds and property only shall be liable for claims on the company, and they are transferred, his claim follows them into new hands (*o*).

Indorsement.—And if the annuitant accepts an indorsement on his contract by the transferee company, this would seem to amount to novation (*p*).

Effect of successive amalgamations.—The effect of successive amalgamations, if agreed to by the creditor, would be to transfer his claims on the assets of the original company to the assets of the last amalgamating company, including all that it had received from the different companies amalgamated. Thus if an annuity contract was entered into with the St. George Company, which amalgamated with the Metropolitan Counties in 1861, which in 1862 amalgamated with the Western, which in 1865 amalgamated with the Albert, the claim of the annuitant would be transferred from the St. George Company to the assets of the Albert Company as well original, as those derived from amalgamation (*q*).

(*m*) Re *National Provident Life*, 9 Eq. 306. *Pott's Case*, 5 Ch. App. 118, 18 W. R. 266.

(*n*) Re *India and London Life Co.*, 7 Ch. App 651.

(*o*) *Dowse's Case* (European), 3 Ch. D. 384, 46 L. J. Ch. 402, 35 L. T. N. S. 653.

(*p*) *Dale's Case*, Reilly (Alb. Arb.) 11. See *Pott's Case*, *supra*.

(*q*) *Dale's Case*, *supra*.

[* 414]

*CHAPTER XXIII.

FOREIGN COMPANY.

Domicile of company.—The domicile of an insurance company may be of great importance to those who deal with it; for it is very common for companies constituted within and under the laws of one jurisdiction to carry on business in another. Thus Scotch companies do a large business in England, and English companies appear in suits before the Courts of the United States and of every colony in the empire, and the colonial companies very often trade in other colonies. And usually, as a check on their agents, such companies refuse to allow any agents other than directors to grant policies (*a*). And also they have much if not most of their assets in some other jurisdiction.

Foreign insurance companies can trade here freely.—An insurance company is domiciled where its chief registered office is (*b*).

No special terms are in this country laid upon foreign insurance companies which are not also laid on English companies (*c*). Existing foreign companies need not register under the Companies Acts, whether established before or after 1862, nor must they be incorporated according to the laws of their own country (*d*).

Rights of foreign companies.—Companies formed out [*415] side the United Kingdom may *trade irrespectively of any convention. They cannot register under the Companies Acts, 1862, without dissolution and re-formation. So their coming to trade in England will not alter the liability of the members of the company in any way (*e*).

By virtue of special conventions, French, German, Belgian, or Italian insurance companies, legally constituted under the laws of their respective countries, may freely exercise all their rights under such constitution in this country, including the right of appearing before the Courts as plaintiffs or defendants (*f*), so far as such constitution complies with the laws and customs of this country, *i. e.*,

(*a*) *Kelly* v. *London and Staffordshire*, 1 Cab. & Ellis 47. In some colonies the Legislature has intervened, and forced foreign companies to name an agent and lodge funds within the jurisdiction: South Australia Act, No. 277 of 1878.

(*b*) *Jones* v. *Scottish Accident Co.*, 17 Q. B. D. 421

(*c*) Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61).

(*d*) *Bateman* v. *Service*, 6 App. Cas. 386, 50 L. J. P. C. 41, 44 L. T. N. S 86.

(*e*) *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764, 769, 6 Moore, P. C. N. S. 481.

(*f*) See Conventions in Buckley 625.

that they are found to comply with the conditions prescribed by the laws of this country (*g*).

It does not matter whether the companies were formed before or after the making of the conventions (*g*). But almost the only change effected by these conventions, as will be seen from the cases already cited, has been to admit English companies in the countries named, the foreign companies having already been admitted here.

American experience of foreign companies.—American reports teem with cases of insurance trading outside the State in which the companies are associated for trading purposes. But such cases, while in many respects they will illustrate the rules of English law on the subject, go to a great extent on special statutes empowering policy-holders to sue in the State of their domicile irrespective of the domicile of the insurers (*h*).

Foreign contract law applicable.—The law which applies to a contract with a foreign country is well stated as follows:—"When a suit is brought on a policy in a State other than that where the contract is made or to be performed, the *lex fori* governs the remedies for enforcing the contract, but not its construction or the legal rights arising under it. These depend usually on the laws of the place where the contract is to be performed, although, where there is anything in the circumstances to show that parties had specially in view the law of the place where the contract is made, this law will govern though the contract is to be performed elsewhere" (*i*). [* 416]

Provision excluding foreign law.—Where the contract is foreign, by the test given above it will be, unless otherwise provided, governed by the law of the foreign country in which it is made. But this will not wholly oust the jurisdiction of the Courts of the assured's domicile (*k*), and, if the insurers have an office within that domicile for the receipt of premiums, service on their agent will, it seem, be permissible (*l*).

Where an assignment was made abroad of an English life policy, and the assignor and assignee were domiciled abroad, the validity of the assignment was determined by the law of the place where the assignment was made (*m*).

Policy of foreign company doing business here.—When a policy is granted by a foreign company carrying on business within the realm, the contract will be held to be made at the head office abroad

(*g*) *Ibid.*, 625, 627.

(*h*) *Cromwell* v. *Royal Canadian Insurance Co.*, 49 Maryland 366. *Universal Life Co.* v. *Bachus*, 51 Maryland 28. *Myer* v. *London, Liverpool, and Globe*, 40 Maryland 595.

(*i*) *Ruse* v. *Mutuul Benefit Co.*, 23 N Y. 516.

(*k*) *Parken* v. *Royal Exchange*, 8 C. S. C. (2nd series) 365.

(*l*) *M'Cullough* v. *Yorkshire Insurance Co.*, 1 Crawford & Dix (Ir. Circ. Rep.) 264 (1838).

(*m*) *Lee* v. *Abdy*, 17 Q. B. D. 309, 34 W. R. 653; see also *Mutual Life Co.* v. *Allen*, 52 Am. Rep. 247, 138 Mass. 24.

of such company if the consent to issue it must be and is there given (*n*), and it may be sued on there. Consequently, where a person with English domicile takes out a policy from such a company, it would seem that payment of the amount thereof [* 417] under judgment in *the domestic forum of the company to the administrator within such forum of the assured, would be a bar to any suit for the recovery of the amount of the policy in the domicile of the insured (*o*).

Foreign contract place of payment.—Where the policy is foreign and no provisions are made therein as to the place of payment, &c., demand must be made at the head office abroad before the company can be considered in default (*p*), since the *locus contractus* is *locus solutionis* unless expressly otherwise provided (*q*). But in case of insolvency, the creditor on a policy would be entitled to rank in his own forum against any funds deposited within its jurisdiction (*r*), and generally having got judgment on his policy here or abroad, in accordance with the law governing it, would be entitled to rank as a secured or unsecured creditor (according to the terms of his policy) on the assets of the company here (*s*).

Condition making it English.—If the assured wants a contract with a foreign company to be governed by the law of his own country, he should have a provision to that effect inserted in the policy, which will be effectual to oust the *lex loci contractus* (*t*). If he thinks the foreign law more favourable to him, he can contract accordingly.

In dealing with foreign companies, it is necessary, in order to avoid such an inconvenience, to see that the policy contains a provision that payment on it shall be made in the domicile of the assured, since in a foreign contract the *locus solutionis* is foreign too unless otherwise stipulated (*u*).

[* 418] **Provision for policies in different jurisdictions.*—Perhaps the best example of the mode in which the insurance companies can make provision for policies in different jurisdictions is to be found in the special Act of the Scottish Widows' Fund, a company domiciled in Scotland, wherein it is provided that every policy effected with a company having its head office in London or Dublin respectively, even though it should appear

(*n*) *Equitable Life Co. of the U. S* v. *Perrault*, 26 Lr. Can. Jur. 382. *Parken* v. *Royal Exchange* (1846), 8 C. S. C. (2nd series) at 372. *Redpath* v. *Sun Mutual Co.*, 14 Lr. Can. Jur. 90. Von Savigny, Conflict of Laws, tr. by Guthrie (2nd ed.), 156, 215, 265, and notes.

(*o*) *Equitable Life Co. of the U. S.* v. *Perrault*, 26 Lr. Can. Jur. 382 (1882), a very full case.

(*p*) *Ibid.*

(*q*) *Parken* v. *Royal Exchange*, 8 C. S. C. (2nd series) 365-375.

(*r*) *Orr Ewing* v. *Orr Ewing*, 21 Sc. L. R. 423, 11 C. S. C. (4th series) 600. *Equitable Life Co.*, v. *Perrault, ubi supra.*

(*s*) *Thurburn* v. *Steward*, L. R. 3 P. C. 478, 40 L. J. P. C. 5, 19 W. R. 678.

(*t*) *Robinson* v. *Bland*, 2 Burr. 1077.

(*u*) *Parken* v. *Royal Exchange*, 8 C. S. C. (2nd series) 365-375, per Lord Cockburn.

on the face of the policy that it was not in fact effected in England or Ireland (*x*). S. 56 of the same Act contains a further provision to the same end, that assignments and discharge of policies of the society executed outside the United Kingdom shall be valid and effectual if made and executed according to the usual mode of making and executing such ducuments in the United Kingdom, or in the place where the same shall have been made and executed.

Law as to deposit inefficacious.—The statutory requirement that every life insurance company should deposit £20,000 with the Accountant-General applies equally to all companies, British or foreign; but as there is no provision insisting that companies not domiciled within the jurisdiction should keep the fund deposited after they have satisfied the test by the Act provided, the assured has no guarantee that a fund will remain in this country to satisfy his claims (*y*). In the case of large foreign companies it seems to be the practice to lodge assets with trustees within this country to answer claims there arising. This procedure provides funds upon which judgment may be executed within the domicile of the assured, or on which he may rank as a creditor, but does not obviate the necessity of the provisions already mentioned as to the law which is to govern the construction of the contract (*z*). It may, however, be observed that insurance *law varies [* 419] little throughout those countries where insurance is practiced.

Scotch Law.—In Scotland jurisdiction on a foreign policy can be with certainty created if doubt arises by arrestment of funds of the foreign insurer within the jurisdiction (*z*). An English company dealing in Scotland by an agent not allowed to do more than give interim receipts must, it seems, be sued in England (*a*). So also when the company was English, and a conditional policy was granted in Australia (*b*); and in a recent case suit was brought in England on a policy granted by an English company on property in Minnesota (*c*).

Test when contract by agent is foreign.—If the insurer's agents in the country of the assured have power to effect a complete contract there without reference for consent to the foreign head office, the contract will not be foreign (*d*), and will be valid where made, even though forbidden by a monopoly within the domestic forum (*e*) of the insurers.

(*x*) The Scottish Widows' Fund Act, 1882 (45 and 46 Vict. c. lxxv.), s. 55.
(*y*) 33 & 34 Vict. c. 61, s. 3.
(*z*) P. 417, *supra*; and see Ex parte *Dever*, 18 Q. B. D. 660.
(*z*) *Parken* v. *Royal Exchange*, 8 C. S. C. (2nd series) 365.
(*a*) *Mackie* v. *European Co.*, 21 L. T. N. S 102, 17 W. R. 987.
(*b*) *Rossiter* v. *Trufalgar Life*, 27 Beav. 377.
(*c*) *Kelly* v. *London and Staffordshire Co*, 1 Cababe & Ellis 47.
(*d*) *Albion Insurance* v. *Mills*, 3 Wilson & Shaw (Sc.) 218, 233 1 D. & Cl. (H. L.) 242.
(*e*) Same case, followed in *St. Patrick Co.* v. *Brebner*, 8 C. S. C. (1st series) 51.

Proceedings where contract and company foreign.—Where the company and the contract are both foreign, judgment may be obtained in the *locus contractus*, and then proceeded on in the English courts (*f*), and a winding up order may be obtained against a registered company even though the persons, property, management, and directorship be abroad, provided that it is a company which at the outset contemplates some description of business in this country, even although in substance all its operations may be abroad (*g*).

[* 420] *It has been laid down by the Irish Courts that a company which holds an office in a foreign country for the receipt of premiums, where the entire contract is made and where the office is still open for future contracts, does by such contract enter into an engagement that for all purposes of suit their office shall be deemed their dwelling-house (*h*). Formal completion of the contract at the head office will not make any difference, as the holding open office is an undertaking that the office is to be deemed their residence, not only for receipt of premiums, but also for enforcing the contract (*i*). But as before mentioned an action has been brought in England on a policy granted by an English company (through a broker) in Minnesota (*k*), and in New York State on a policy there granted on property in Canada (*l*).

Service of writ on company.—Substituted service has been allowed on an agent in Dublin of an English company who had received some of the premiums for them, the company refusing to appear in Ireland and requiring suit in England (*m*). But under the new Rules (*n*) a policy effected in England with a Scotch or Irish company cannot be sued on here unless the contract is made at the company's office here; for there is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Ord. xi. r. 1 (e), where the defendant is domiciled in Scotland or Ireland (*o*).

(*f*) Which can now be done under R S. C. 1883, Ord. iii. r. 6, and Ord. xiv. *Grant* v. *Easton*, 53 L. J. Q. B. 68, 49 L. T. N. S. 645, 32 W. R. 289.

(*g*) *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764. *Bateman* v. *Service*, 6 App. Cas. 386, 50 L. J. P. C 41, 44 L T. N S 436. *Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176, 40, L. J. Ch. 655, 24 L. T. N. S. 641, reported also as Re *General Land Credit Co.*, 5 Ch. App. 363, 23 L. T. N. S. 454, 18 W. R 505.

(*h*) *Moloney* (*Exor.*) v. *Tulloch*, 1 Jones (Ir. Ex.) 114 (1835). *Kelly* v. *London and Staffordshire*, 1 Cababé & Ellis 47.

(*i*) Same case. And see *Welsh* v. *Reynolds*, 3 Ir. Law Rec. N. S. 105.

(*k*) *Kelly* v. *London and Staffordshire Fire*, 1 Cababé & Ellis 47. *Lycoming Co* v. *Ward*, 90 Ill. 545.

(*l*) *Equitable Life Co.* v. *Perrault*, 26 Lr. Can. Jur. 382.

(*m*) *M'Cullagh* v. *Yorkshire Insurance Co.* (1838), 1 Crawford & Dix (Ir. Circ. Rep) 264. *Kelly* v. *London and Staffordshire Fire*, 1 Cababé & Ellis 74.

(*n*) R. S. C. 1883, Ord. xi. r. 1 (e).

(*o*) *Lenders* v. *Anderson*, 12 Q. B. D. 50, 53, L. J. Q. B. 104, 49 L. T. N. S. 537, 32 W. R. 230. *Jones* v. *Scottish Equitable*, 17 Q. B. D. 421.

When a company with head office in England was sued [421] in Ireland and served in England in accordance with the Irish practice, and failed to appear, the validity of a judgment by default in Ireland was held not to be affected by proof in English courts that the service was invalid (*p*). The Court will allow proceedings on the foreign judgment under Ord. xiv. of the Rules of the Supreme Court, 1883 (*q*).

Judgments obtained by or against insurance companies in one part of the United Kingdom are enforceable in any other part of the kingdom in conformity with the provisions of the Judgment Extensions Act, 1880 (*r*).

(*p*) *Sheeley* v. *Professional Life*, 27 L. J. C. P. 233 (Ex. Ch 1857).

(*q*) See R. S. C 1883, Ord. iii. r. 6. *Grant* v. *Easton*, 53 L. J. Q. B. 68, 49 L. T. N. S. 645, 32 W. R. 239.

(*r*) 31 & 32 Vict. c. 54.

[*422] # *CHAPTER XXIV.

AGENTS.

Agents necessary to all companies.—All insurance partnerships or corporations must, by their very nature, act through agents (*a*). But the powers of those agents vary considerably (1). The acts of the managers or directors or governing body of an insurance corporation are binding on the corporation, unless they exceed the powers of the corporation as declared by the instrument constituting it, or the particular powers by such instruments accorded to the managing body.

But such companies have also many subordinate agents, whose powers are variously limited, and who, while they cannot any more than the managing body bind the corporation by an infringement of the articles of its constitution, are still further disqualified from many acts by the special character of the authority given to them by the managing body (*b*) (2).

Powers of directors, &c., presumed to be known.—Persons dealing with insurance companies will be deemed to have notice of the powers of their managers, whatever the mode in which the company is constituted, so far as the constitution of the company defines and limits the same. But merely directory provisions therein, which are only for the guidance of the directors, do not concern, and will not affect, persons dealing with the company (*c*).

Authority of general agent.—And it seems to be good law [*423] that "the powers of a *general agent are *prima facie* co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals" (*d*), except on some such ground as the notice

(*a*) *Montreal Assurance* v. *M'Gillivary*, 13 Moore P. C. 87, 8 W. R. 165. Brice Ultra Vires (2nd ed.) 42

(*b*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327, 25 L. J. Q. B. 317 (Ex. Ch.)

(*c*) *Agar* v. *Athenæum* (1858), 8 C. B. N. S. 725, 27 L. J. C. P. 95, 6 W. R. 277 *Prince of Wales Co* v. *Same*, 31 L. T. O. S. 149.

(*d*) *Insurance Co* v. *Wilkinson*, 13 Wall (U. S.) 222. *Gale* v. *Lewis*, 9 Q. B. 730, 16 L. J. Q. B. 119 *Shannon* v. *Gore District Mutual*, 2 U. C. (App.) 396. *Hastings Mutual Co.* v. *Shannon*, 2 Canada 394.

[1] A local agent, with authority to receive premiums and issue policies, has no authority, as such, to waive condition of policy requiring assent of company to circumstances affecting the risk. *Kyte* v. *Commercial Union Assurance Co.*, 144 Mass 43.

[2] An agent, receiving from assured application for change in policy, and undertaking to procure such change, is to be treated as agt. of assured and not of company. *Duluth Bank* v. *Knoxville F. Ins. Co.*, 85 Tenn. 76.

which persons dealing with a company must be taken to have of such powers, where they are conferred by statute or other instrument constituting the company.

General agent not authorized to promise policy.—General agency does not give an authority to insure or impose any duty to do so (*e*). It is not within the ordinary duty of an insurance agent to undertake to grant a policy, and such an undertaking will not bind the company unless the agent was specially authorized (*f*).

Representations of agent bind company. Answers by agent for assured.—The representations of an agent having authority to solicit insurances and receive proposals bind the company (*g*); and where an agent of the insurer writes the answers of the assured for him, the assured is presumed to have read such answers before signing them (*h*) (*).

Del credere.—*Del credere* agents, who are commissioned to insure, may insure as owners, and, if sued for premiums in case of a loss, can set off the amount of the policy (*i*). But if they describe themselves in the policies as agents, though they may be liable for the premiums, they have nothing to do with the policies (*k*).

If the general agent of a company makes an unwise contract for them, or is satisfied with answers in proposals which ought not to have been deemed satisfactory, *in these and many [* 424] more supposable cases (collusion on the part of the person seeking insurance being out of the question) the company will be clearly bound, because in all the supposed cases the agent would be acting within the scope of the authority which the company held him out as possessing (*l*).

General agent may extend time for paying premiums.—If a general agent gives grace for the payment of overdue premiums, the company will, it seems, be bound, and, if not bound, if the directors re-receive the agents accounts with the entry of acceptance of overdue premiums without objection, they will ratify his act (*m*).

General agent cannot extend time for paying premiums where condi-

(*e*) *French* v. *Backhouse*, 5 Burr. 2728.

(*f*) *Linford* v. *Provincial Horse and Cattle Co.*, 34 Beav. 291, 10 Jur. N. S. 1066, 11 L. T. N. S. 330.

(*g*) *Splints* v. *Lefevre*, 11 L. T. N. S.114.

(*h*) *New York Life* v. *Fletcher*, 10 Davis (Sup. Ct. U. S.) 519.

(*i*) *Wienholt* v. *Roberts*, 2 Camp N. P. 586 (1811). *Koster* v. *Eason*, 2 E. & S. 112

(*k*) *Baker* v. *Langhorn*. 4 Camp. 396.

(*l*) *Montreal Assurance Co.* v. *M'Gillivray*, 18 Moore P. C. 87–124, 8 W. R. 165.

(*m*) *Moffat* v. *Reliance Mutual Life*, 45 U. C. (Q. B) 561. *Neill* v. *Union Mutual Life*, 45 U. C. (Q. B.) 593.

* Company held liable, in following cases, where agent filled up answers in application: *Sullivan* v. *Phenix Ins. Co.*, 84 Kansas 170. *Mullin* v. *Vermont Mut. Ins. Co.*, 58 Vt. 118. *Eggleston* v. *Council Bluffs Ins. Co.*, 65 Iowa 308. *Breckenridge* v. *American Central Ins. Co.*, 87 Mo. 62. *Susquehanna Mut. F. Ins. Co.* v. *Cusick*, 109 Pa. St. 157. *Phenix Ins. Co.*, v. *Allen*, 109 Ind. 278. *Stone* v. *Hawkeye Ins. Co.*, 68 Iowa 737. *Donnelly* v. *Cedar Rapids Ins. Co.*, 70 Iowa 698.

tion to contrary.—But even a general agent cannot extend time for payment of premiums in the face of a condition in the policy that no waiver of any condition shall be valid unless made at the head office and signed by an officer of the company (*n*).

General agent of foreign company fully represents company as to receiving premiums.—If the company is a foreign company, its general agents must, for the purpose of receiving premiums, be regarded in the same light as the company itself, and knowledge and information brought home to such agents is the same as if made or brought home to the company itself (*o*).

Agreement by director to pay commission to agent after agency ceased.—It is not within the power of directors of an insurance company to agree with an agent (1) for continuance of payment to him after retirement from the agency of a commission on premiums on policies effected through him and in force at his retirement, if there is no stipulation that he shall continue in the agency for a stipulated time, nor that the commission shall cease if the premiums [* 425] cease to be paid, or (2) for allowance of *commission on premiums to his wife and children after his death in the agency (*p*).

Director appointed to select agents at a commission.—An agreement appointing a director of a life assurance company to select agents and medical referees for the company, the director to be paid a commission on policies effected, is not a contract of service within the exceptions to s. 29 of the Joint-Stock Companies Act (7 & 8 Vict. c. 110), which enacts that all contracts between directors and companies in which the director is interested are void. Consequently such agreement is void, and such director can recover nothing on it (*q*).

By the Joint-Stock Companies Act, 1862, s. 57, a director vacates his office if he is concerned in or participates in the profits of any contract with the company.

Contract by director in fraud of company void against purchaser for value.—If a director makes a contract in fraud of the company with a person cognizant of the fraud, such a contract is void even in the hands of an assign for value who is totally innocent of the fraud (*r*).

Larger powers of agents in America than England.—The larger powers given to insurance agents in the United States, where in many cases they represent their companies for all the purposes of an insurance business, and can therefore bind them to an almost

(*n*) *Marvin* v. *Universal Life*, 89 Am. Rep. 657, 85 N. Y. 278.

(*o*) *Wilson* v. *Genesee Mutual*, 16 Barb. (N. Y.) 511. *Campbell* v. *National Insurance Co.*, 24 U. C. (C. P.) 138, 144. *Moffat* v. *Reliance Mutual Life*, 45 U. C. (Q. B.) 561.

(*p*) *Lewine's Case*, Reilly (Alb. Arb.) 174, 15 S. J. 828. *M'Clure's Claim*, 5 Ch. App. 737, 39 L. J. Ch. 685, 23 L. T. N. S. 685, 18 W. R. 1123.

(*q*) *Poole* v. *National Provincial Life*, 27 L. J. Ex. 219.

(*r*) *Athenæum Life Assurance* v. *Pooley*, 3 De G. & J. 294, 28 L. J. Ch. 119, 1 Giff. 102, 5 Jur. N. S. 129.

unlimited extent within the scope of such business, render the American cases generally unsafe guides in this country, where powers of a much more limited character are given to the local agents of insurance companies (*s*).

Ostensible authority not qualified by private instructions.—Where an agent is clothed with ostensible authority, no private instructions can prevent his acts within the scope of that authority from binding his principal; where his authority depends, and is known by those *dealing with him to depend, on written [* 426] mandate, it may be necessary to produce or account for the non-production of that writing in order to prove what was the scope of the agent's authority (*t*).

Extent of authority of agent without special instructions.—An agent who answered an advertisement for agents to represent an insurance society, and received a reply that the directors had appointed him agent, but got no special instructions as to the nature of his duties or the extent of his authority, and no directions as to receiving or refusing notices of withdrawal, or as to transmitting information thereof to head-quarters, was held by Vice-Chancellor Wood a sufficient agent for the purpose of receiving such notice, so that notice to him would be notice to the company, and the person who had given such notice was held entitled to be struck off the list of shareholders (*u*).

Where an authorized agent to whom notice is given, is also solicitor to the party giving it, and receives the notice as such solicitor for the purpose of transmitting it as agent, the notice is effectual in both capacities, and the company are bound though the notice be not in fact sent to them by their agent (*v*).

A mere casual notice will not suffice; it must be notice to the agent as agent (*x*) in the course of business (*y*).

Mistaken instructions. Company bound.—An agent may bind his company by acting on instructions erroneously delivered, and a company have been held bound by an adjustment effected by an agent instructed by telegram to decline, which word was in transmission altered into "decide" (*z*), that giving him ostensible authority to do what he did.

If a clerk of the company gives a receipt for a premium, [427]

(*s*) *Western Assurance Co.* v. *Provincial*, 26 Grant (U. C.) 561.

(*t*) *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176, 209, 43 L. T. N. S. 60, per Lord Blackburn. *Montreal Assurance* v. *M'Gillivray*, 13 Moore, P. C. 87, 121, 8 W. R. 165.

(*u*) *Hawthorne's Case*, 31 L. J. Ch. 625.

(*v*) *Gale* v. *Lewis*, 16 L. J. Q. B. 119, 10 W. R. 572.

(*x*) *Edwards* v. *Martin*, 1 Eq. 121, 35 L. J. Ch. 186, 13 L. T. N. S. 236, 14 W. R. 25. *Gale* v. *Lewis*, 9 Q. B. 730.

(*y*) *North British* v. *Hallett*, 7 Jur. N. S. 1263, 9 W. R. 880. *Hawthorne's Case*, *supra*.

(*z*) *Provincial Co* v. *Roy*, 2 Stephens Quebec Digest 400.

they will be bound even if no policy had been issued at the time of fire (*a*).

Agent acting through sub-agent.—Although an agent cannot delegate his authority, there are many things which he may do through a sub-agent, and which are valid when so done; for example, where a proposal for a life policy was accepted on behalf of an insurance company by their agent abroad, who acted in the transaction through the medium of a sub-agent, and the premium was paid, it was held binding on the company, although the agent had no authority to appoint a sub-agent (*b*).

Company bound by acts of agent where intention to insure in another office.—Where a company by its agent receives money for an insurance, and a fire happens before a policy is issued, the company will be liable, even though the insured intended to insure in another office, and inadvertently accepted the receipt, supposing it to be the receipt of such other office. Thus W., as agent of the Commercial Union Company, accepting an insurance by M. in that office, W., without M.'s knowledge, ceased to be such an agent and became agent for the European Company, and, on M.'s application for a fresh policy, W. gave him a printed receipt, filled up for a policy for a month, until a regular policy should be made out. M. did not at first discover that the receipt was on behalf of the European Company, but, when he did, he wrote to W., saying he should require to be satisfied of their respectability and standing. Before any policy was made out, the premises were burnt, and the European office refused to pay, but M. was held entitled to recover (*c*).

Credit of premium to agent, company not bound to issue policy.—Where an application is accepted by the company, but the [* 428] premium only credited to the agent in the *books of the applicant, the company cannot be made to issue a policy or pay on the footing of its issue, if prepayment of premium is an essential and there be no proof that credit was intended (*d*), and the sending of a receipt by the agent without actual receipt of the money will not complete such a contract. The receipt is a "mere acknowledgement in abeyance" (*e*).

Agent to insure by policy on payment of premium cannot insure by parol or dispense with payment. Payment by cheque to agent whose banking account overdrawn sufficient.—A man who is and is known to be an agent only for effecting insurances by policy on payment of a premium cannot effect a parol insurance, nor dispense with prepayment of premium; and if he does such acts they will not

(*a*) *Paré* v. *Scottish Imperial Co.*, 2 Stephens Quebec Digest 410. *Duval* v. *Northern Co.*, do. 410.

(*b*) *Rossiter* v. *Trafulgar Life Co.*, 27 Beav. 377.

(*c*) *Mackie* v. *European Co.*, 21 L. T. N. S. 102, 17 W. R. 987.

(*d*) *Walker* v. *Provincial*, 7 Grant (U. C.) 137, 8 Grant (U. C.) 217.

(*e*) 8 Grant (U. C.) 219, per Robinson, C.J.

bind the company (*f*), but will be *ultra vires* and void as not being within the scope of his authority. Where a premium due was paid by cheque to B., an agent of the insurers authorized to receive premiums, and the cheque was credited to B.'s account, which was overdrawn, this was held payment to the company, and the company could not either avoid the policy or maintain an action for the premium. The cheque, of course, was honoured (*g*), and an agent, of course, is only bound to hand over an equivalent, not the money received (*h*).

Agent insuring himself.—An insurance agent's authority does not empower him to grant an insurance in his own favour binding on his principals, even if it be a second insurance, and the prior policy has been granted with the express sanction and approval of the company. His business is to represent the insurance company in dealing with others. In insuring himself he would have to act in two capacities (*i*).

**Agent cannot insure himself against fire beyond company's* [* 429] *limit.*—Even where an agent is allowed to insure himself with the company for which he is agent, he cannot so insure for a sum exceeding the limit fixed by the rule of the company (*k*).

Agent taking assignment of policy and crediting company with premiums after forfeiture.—If an agent takes an assignment of a policy, and credits the company with the premiums after forfeiture has occurred, the policy will be invalid, but an action will lie at law for their return if the forfeiture is enforced (*l*).

Agent taking out policy in which he was interested without disclosing such interest, policy was void.—An authorized agent of an insurance company received and accepted an application and negotiated an insurance as agent on property of which he was one of the owners, and communicated the transaction to his principal without disclosing his interest, and on receiving the policy handed it to the person named in the policy as being assured thereby. The policy was on that ground held void, and, the contract being one, other interests fell too (*m*).

Communications between insurers and agent when privileged.—There seems to be some authority for saying that the communications between the insurers and their agent are privileged if they form part of the preliminary investigation of the insurers made with reference to the case (*n*).

(*f*) *Montreal Assurance Co.* v. *M'Gillivray*, 13 Moore P. C. 87, 124, 8 W. R. 165.

(*g*) *Etna Life Co.* v. *Green*, 38 U. C. (Q. B.) 459.

(*h*) See *Bridges* v. *Garrett*, L. R. 5 C. P. 451, 39 L. J. C. P. 251, 23 L T. N. S. 448, 18 W. R. 815.

(*i*) *White* v. *Lancashire Insurance Co.*, 27 Grant (U. C.) 61.

(*k*) *Tucker* v. *Provincial Insurance Co.*, 7 Grant (U. C.) 122.

(*l*) *Busteed* v. *West of England Co.*, 5 Ir. Ch. 553.

(*m*) *Ritt* v. *Washington Marine*, 41 Barb (N. Y.) 353.

(*n*) *Pacific Mutual Co.* v. *Butters*, 17 Lr. Can. Jur. 309. See *Baker* v. *L. & W. R.*, L. R. 3 Q. B. 91, 37 L. J. Q. B. 53, 16 W R. 126. *Grant* v. *Etna Co.*, 11 Lr. Can. Rep. 128.

Agents for two companies have power to re-insure one in the other.—An agent for two insurance companies having authority from one to accept marine risks to an amount not exceeding $5000, accepted a marine risk for $7700 in favour of that company, but re-insured for $2700 in the other, and directed a clerk to enter a memorandum to that effect in the books of the second company, but gave no [* 430] notice to that company until after a loss *occurred. The re-insuring company was held not entitled to recover back the amount of re-insurance, if paid by the agent on a loss, without proof that the agent acted *mala fide* in affecting the insurances, or did not conform to the rules of his principals known to the re-assured (*o*).

Settlement of premiums in monthly account between two agents—A practice of the agents of two companies to effect re-insurances without immediate payment of premiums, but on a monthly balance of accounts unsanctioned by the company, and whereof they had no notice, this re-insurance account not being sent up to head-quarters, is not binding on the companies (*p*).

Courts inclined to support insurance, though local agent not strictly within authority.—Fire and life assurances are carried on to an enormous extent through local agencies, and not by direct dealings with the officers of the companies at their head-quarters (*q*). It is consequently of the highest importance to those dealing with such agents, and the Courts are inclined to insist, that the assured should not run the peril of the agent neglecting strictly to perform his duty (*r*). For if a policy is to be held vitiated because, in a manner of which the assured is ignorant, the agent goes beyond his authority, no insurance effected through an agent would be safe (*s*). In America, however, the Courts have gone so far as to hold that where the insurance agent wrote out the particulars of a proposal, and made a false representation as to the facts of which the assured told him the truth, the assured could not prove his parol statement as against the written falsehood, and could not therefore enforce the policy (*t*) (4). The agent doing this was, however, by stipulation, the agent of the assured (5).

(*o*) *Canada Insurance Co.* v. *Western Insurance Co.*, 26 Grant (U. C.) 264.

(*p*) *Western Assurance Co.* v. *Provincial Insurance Co.*, 26 Grant (U. C.) 561.

(*q*) *Mackie* v. *European Co.*, 21 L. T. N. S. 102, 17 W. R. 587.

(*r*) *Wing* v. *Harvey*, 5 De G. M. & G. 265, 23 L. J. Ch. 511, 23 L. T. O. S. 120, 18 Jur. 394, 2 W. R. 379.

(*s*) *Mackie* v. *European Co.*, *ubi supra*.

(*t*) *Rohrbach* v. *German Fire Ins. Co.*, 20 Am. Rep 451, 462, but see *Swan* v. *Watertown Ins. Co.*, 96 Penn. 37 (1880). *Planters Co.* v. *Myers*, 30 Am. Rep. 521.

[4] Company held liable where the agent made false answers in filling up the application. *Sullivan* v. *Phenix Ins. Co.*, 34 Kan. 170. *Mullin* v. *Vermont Mut. Ins. Co.*, 58 Vt. 113. *Eggleston* v. *Council Bluffs Ins. Co.*, 65 Iowa 308. *Breckenridge* v. *American Central Ins. Co.*, 87 Mo. 62. *Susquehanna Mut. F. Ins. Co.* v. *Cuseck*, 109 Pa. St. 157. *Phenix Ins Co.* v. *Allen*, 109 Ind. 273. *Stone* v. *Hawkeye Ins Co.*, 68 Iowa 737.

[5] An agent of the insurance company is not to be deemed the agent of the as-

Agreement to grant policy may be specifically performed. [* 431] *Local agent cannot bind company to grant policy. Powers of local agent.*—Specific performance, it would seem, may be had of an agreement to grant a policy of assurance, provided that the agreement be made on behalf of the company by an agent properly qualified to do so and acting within the scope of his authority. But an ordinary local agent has no authority to enter into a contract to grant a policy without the sanction of the directors of the company. He is merely an agent to receive and submit proposals made, and to inform the applicant of the decision of the directors on his proposal. He cannot on receiving the premium say with binding effect that a policy shall be granted. And if an applicant trusts such an agent and pays him the premium before receiving the policy, he has no equity to obtain a policy. It would be otherwise probably with a renewal premium paid to such agent, whose receipt, unless otherwise stipulated, would be a good discharge to the assured. If the premium gets to the company's hands, and (from whatever reason) they are not bound to issue a policy, they must return the premium (*u*).

Authority to receive applications is not authority to accept them.—Power to solicit, receive, and report applications will not imply power to accept them or bind the company, his principals, by stating that the right attached at a certain moment (*x*). Such an agent would not earn his commission till the company had inspected the property, or otherwise decided on the character of the risk, and would, in fact, be a mere person employed to obtain business. *Authority to receive premiums does not authorize giving credit.*—Even if he has power also to receive or remit premiums, this will not entitle him to give credit for the renewal premium beyond the time limited in the policy (*y*).

Company bound by local agent acting with authority.—The local agent of an insurance company must be *treated as [* 432] their officer to communicate with persons effecting insurances, and what he says or does in that capacity within the proper bounds of his authority must be held binding on the company (*z*).

Notice to a local agent.—Delivery to local agents of notice of fire is sufficient within a condition requiring notice to the company unless the policy otherwise stipulates (*a*) (*).

sured because a by-law of the company so provides. *Nassauer* v. *Susquehanna Mut. F. Ins. Co.*, 109 Pa. St 507.

(*u*) *Linford* v. *Provincial Cattle Co.*, 11 L. T. N. S. 330, 5 N. R. 29, 10 Jur. N. S. 1066, 34 Beav. 291. *Henry* v. *Agricultural Mutual Insurance Co*, 11 Grant (U. C.) 125. 1 Lindley on Partnership 248.

(*x*) *Stockton* v. *Fireman's Ins. Co.*, 39 Am. Rep. 277, 33 La. Am. 577.

(*y*) *Critchett* v. *American Insurance Co.*, 36 Am. Rep. 230, 53 Iowa 404, and American cases there collected. *Busteed* v. *W. of England*, 5 Ir. Ch. 553.

(*z*) *Penley* v. *Beacon Ins. Co.*, 7 Grant (U. C.) 130.

(*a*) *Peppitt* v. *North British and Mercantile* (1879), 1 Russ. & Gedd. (Nov. Sco.) 219. *Butterworth* v. *Western Insurance Co.*, 132 Mass. 489

* Notice to soliciting agent that applicant keeps gunpowder on premises is not notice to company. *Liverpool & L. & G. Ins. Co.* v. *Van Os.*, 63 Miss. 431.

Where notice to be given to head office, notice to local agent insufficient.—Notice to a local agent will be useless when the notice ought to be given at the head office (*b*). Verbal notice will, however, suffice if not stipulated against (*c*).

Verbal notice generally sufficient notice to agents.—Notice to an agent if he has power (*d*) to receive such notice will bind the company, even though the agent received such notice in a different capacity, and never communicated it to his principals (*e*). Mere knowledge privately obtained by a party connected with the company will not suffice (*f*). The notice as regards fire policies need not be in writing (*g*) unless so stipulated.

Notice to directors.—Notice to directors must be give to them as such (*h*).

Waiver of forfeiture by receipt of premiums.—An agent, of course, cannot waive a forfeiture (*i*) in the face of a condition in the policy that it shall not attach until the premium is paid, and that only the president or secretary should waive a forfeiture (*k*) (†).

But if the directors receive premiums through a local agent after a forfeiture, the policy will be valid (*l*).

[*433] **Waiver of forfeiture by agent by receipt of overdue premium.*—Although, as a rule, an agent cannot waive a forfeiture, it may be done under special circumstances, as in the following case:—By the non-payment of renewal premium at the stipulated time a policy of life insurance became forfeited. The policy provided that payment, if made when overdue, would not be considered as continuing the policy unless the insured was in good health at the time, but by the practice of the company the agents might receive payment of such premiums and issue the renewal receipts within thirty days after the stipulated time, provided the insured were then in good health. *Meaning of proviso as to insured being "in good health."*—It was held that the proviso as to the insured being in good health did not apply to his actual state, but to the general understanding of the parties and their consequent action thereon. We, therefore, at the time of paying the premium to and the giving of the receipt by the agent,

(*b*) *Hendrickson* v. *Queen Insurance Co.*, 31 U. C. (Q. B) 547.
(*c*) *North British Insurance* v. *Hallett*, 7 Jur. N. S. 1263, 9 W. R. 880.
(*d*) Ex parte *Hennesey*, 1 Connor & Lawson (Ir.) 559.
(*e*) *Gale* v. *Lewis*, 9 Q. B. 730, 16 L. J. Q. B. 119.
(*f*) *Thompson* v. *Speirs*, 13 Sim. 469.
(*g*) *Gale* v. *Lewis*, *supra*, where no written notice was given.
(*h*) *Hawthorne's Claim*, 31 L. J. Ch 625, 6 L. T. N. S. 574, 10 W. R. 572.
(*i*) *Jacobs* v. *Equitable*, 17 U. C. (Q. B) 35 18 do. 14, 19 do. 250.
(*k*) *Calhoun* v. *Union Mutual* (1879), 3 Pugsley & Burb. (New Bruns.) 13, 23. *Butterworth* v. *Western*, 132 Mass. 49.
(*l*) *Wing* v. *Harvey*, 5 De G. M. & G. 205, 23 L. J. Ch. 511, 18 Jur. 394, 23 L. T. 120, 2 W. R. 370

† Agent cannot waive as to matters concerning which policy distinctly states that he shall not. *Enos* v. *Sun Ins. Co.*, 67 Cal. 621. Unless policy provides otherwise, insured is justified in supposing company's agent to have authority to waive a forfeiture. *Silverber* v. *Phenix Ins. Co.*, 67 Cal. 36.

the insured had in fact received an injury which soon after resulted in death, but it clearly appeared that no danger was anticipated by either the insured or his medical attendant, or by the company themselves, who had made inquiry and had full knowledge of his condition, it was held that the payment was good and the forfeiture waived (*l*).

Inspector cannot dispense with prohibitory conditions.—An inspector of risks cannot dispense with conditions relating to the keeping of prohibited or highly hazardous goods either at all or largely in excess of the allowable quantities, or to a mis-description of the mode of heating or the precautions required in case of steam being used, or with respect to chimneys or stove pipes, or the deposit of ashes, or the proximity of dangerous places (*m*).

Effect of companies of their agents filling up applications.—If in every case the proposals for a contract of insurance emanated from the would-be assured, probably no question could arise as to the dealings of insurance agents with such applications. But often, (and especially in America and the colonies) the companies' agents solicit insurance and fill in applications of the *assured, and much litigation has arisen and many pre- [* 434] cautions have been taken by the companies to avoid the consequences of such act on the part of the agents. In some cases it is declared that if the agent fills in the proposal he shall be deemed the applicant's agent. In others he is privately forbidden to fill in the proposal. In the former case the insurer is exempted from (*n*) the liability for his agent's mistakes which would othererwise fall on him (*o*).

Even where an agent is made the agent of an applicant for the purpose of filling in the proposals, this will not in every case bind the assured to what the agent puts down. Thus where the assured, to the question of incumbrances, began to tell about a mortgage, but was stopped by the agent, who said this was immaterial, the insurances being on chattels, and the agent wrote down for an answer "None," the Court of Common Pleas in Upper Canada held that the insured had made no misrepresentation and could recover (*p*).

Effect of war on foreign agency.—The authority of an agent appointed by the general agent and local board of directors in the city of New York of an English insurance company was held not revoked or suspended by the existence of the state of war arising from the

(*l*) *Campbell* v. *National Life Co.*, 24 U. C. (C. P.) 133.

(*m*) *Mason* v. *Hartford Fire Co.*, 37 U. C. (Q. B.) 437, 441.

(*n*) *Naughter* v. *Ottowa Agency Insurance Co.*, 43 U. C. (Q. B.) 121. *Sowden* v. *Standard Insurance Co.*, 44 U. C. (Q. B.) 95. *Blakeley* v. *Niagara District Mutual Fire Insurance Co.*, 16 Grant (U. C.) 198. *Somers* v *Athenæum Co.*, 9 Lr. Can. Rep. 61, 3 Lr. Can. Jur. 67.

(*o*) *Parsons* v. *Bignold*, 13 Sim. 518, 15 L. J. Ch. 379, 7 Jur. 591. Ex parte *Forbes & Co.*, 19 Eq. 485, 44 L J. Ch. 761, 23 W. R. 464

(*p*) *Ashford* v. *Victoria Mutual Ins. Co.*, 20 U. C. (C. P.) 434.

secession of the Southern States. But this went on the ground that the insurers were domiciled abroad, and the New York board were merely their agents with a revocable authority (*q*). The contract of agency was with a principal of neutral domicile, and therefore unaffected by the war (*r*). Payments of premiums to such agents after war begun would bind the insurers (*s*).

[* 435] * *What indorsements agent can make.*—In England agents of fire insurance companies are usually authorized to make indorsements on policies in case of

(A) Removal (*t*).
(B) Transfer of the sum assured to a like risk.
(C) Permission to insure in another office.
(D) Alteration of the name of the assured if it be incorrectly stated in the policy.
(E) Change of firm.
(F) Notice of a mortgagee's interest in a policy or of a change thereon.
(G) Marriage, purchase (*u*), or gift.

In case of sale, satisfactory evidence will be required of the assent of the assured.

Interim receipts cannot be signed by agent's agent.—The agent of an insurance company authorized to sign interim receipts for premiums cannot delegate his functions, and if he engages another person to take risks for him, interim receipts signed by the latter do not bind the company, unless by the subsequent ratification on the part of the company or its agents (*x*).

Contracts of insurance by agents generally valid until rejected.—If an agent has power to enter into contracts of insurance which may or may not be approved at head-quarters, they are valid till receipt of notice of rejection and return of premiums paid, and it seems to make no difference if the agent employs sub-agents in getting assurances. If he does, their receipt for premiums binds

[* 436] *the agent as much as if signed by him (*y*). For though an agent cannot delegate his authority to "another person, he is entitled to perform and must perform a great number of his acts and functions through the aid of persons to whom he delegates his authority; and acts done by such aid, if proper and within the scope of his authority, will be his acts" (*z*).

Company liable for agent's fraud.—An insurance company may be liable for the fraud of their agents acting within the scope of their

(*q*) *Robinson* v. *International Life Ins. Co.*, 42 N. Y. 54
(*r*) *Ibid.* *Seton* v. *Law*, 1 Johnson (N. Y.) 1.
(*s*) *Martin* v. *International Life*, 62 Barbour (N. Y) 181.
(*t*) *Chalmers* v. *Mutual Fire Co.*, 8 Lr. Can. Jur. 2.
(*u*) *Frost* v. *Liverpool, London, and Globe*, 2 Hannay (New Bruns.) 378.
(*x*) *Summers* v. *Commercial Union*, 6 Canada (S. C.) 19. But see *Rossiter* v. *Trafalgar Life*, 27 Beav. 377.
(*y*) *Rossiter* v. *Trafalgar Life Co.*, 27 Beav. 377, affd. on appeal. *Mackie* v. *European Co.*, 21 L. T. N. S 102, 17 W. R. 987.
(*z*) *Rossiter* v. *Trafalgar Life Co.*, 27 Beav. 377, 381.

authority, at least to the extent of the gains of the company obtained by the agent's act. This liability seems to be based on the ground that "every person who authorizes another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract" (*a*). The agent and principal will in such a case both be liable (*b*), and the same would be the case if a sub-agent commits a fraud and the agent profits by it (*c*).

Company not liable for fraud of agent outside company's business.—But no liability falls upon an insurance company for fraud or misrepresentation of the secretary or any other agent outside the business of the company or the ordinary scope of his duties (*d*).

Company compellable to issue policy if premium paid.—If an interim receipt be delivered by an agent fully authorized thereto (*e*), and containing a promise to issue a policy in so many days (*f*), and the insurers neither do so in the time nor refund the premium, they *will be held bound as if they had issued the policy [* 437] (*g*), or be made to issue the policy (*h*) (*).

Company cannot adopt contract by agent outside its business.—An insurance company cannot adopt contracts made by its agents which are not within the scope of the company's business. Thus a company formed for life assurance cannot undertake marine assurance, and even if contracts of marine assurance are granted and for a time treated as binding, the Courts will not allow recovery thereon, but will order the premiums to be repaid or allow them to be proved for in the winding up (*i*).

Company cannot adopt policies of another company so empowered.—Nor can one company adopt the policies granted by another company, unless powers in that behalf are given in the deed of settlement and executed conformably therewith (*j*).

Company can ratify where contract within its powers, though beyond

(*a*) Per Bramwell, L J., in *Weir* v. *Bell*, 3 Ex. D. 238, 245, 47 L. J. Ex. 704, 38 L. T. N. S. 929, 26 W. R. 746.

(*b*) Per Cockburn, C. J., in same case, p. 248.

(*c*) *Cullen* v. *Thomson's Trustees*, 4 Macqueen H. L. 424.

(*d*) *Partridge* v. *Albert Life Co.*, 16 S. J. 199. *Pinchin* v. *Realm Ins. Co.*, C. A. (Feb. 1884). *Giffard* v. *Queen Ins. Co.*, 1 Hannay (New Bruns.) 452.

(*e*) *Mead* v. *Davidson*, 3 A. & E. 303, 309.

(*f*) *Mackie* v. *European Co.*, 21 L. T. N. S. 102, 17 W. R. 987.

(*g*) *Patterson* v. *Royal Ins. Co.*, 14 Grant (U C.) 169.

(*h*) *Albion* v. *Mills Ins. Co.*, 4 C. S. C. (1st series) 575, 3 W. & S (Sc.) 218, 1 Dow & Cl. H. L. 342. *Christie* v. *North British Ins. Co.*, 3 C. S. C. (1st series) 519. *Mead* v. *Davidson*, *supra*, note (*e*).

(*i*) Re *Phœnix Life Ins. Co.*, *Burgess and Stock's Case*, 2 J. & H. 441, 31 L. J. Ch. 749, 10 W. R. 816.

(*j*) *Era Assurance Co.*, 1 De G. J. & S. 29, 2 J. & H. 400, 1 H. & M. 672, 30 L. J. Ch. 137, 3 L. T. N. S. 314, 9 W. R. 67, 11 W. R. 204, 320.

* Agent made out a policy to A, and placed same in hands of a third party until company would accept risk. The company refused to accept risk Held—No delivery of policy, although agent provisionally received the premium from A. *Brown* v. *American Central Ins. Co.*, 70 Iowa 390.

be ratified by the directors—those which they could themselves have made. Some which even they cannot ratify may be ratified by the shareholders, if, though outside the authority of the directors, they are permissible by the constitution of the insurance company.

Where a local agent agrees to grant a policy, receives and remits the proposal and premium, and the directors accept the premium, this will amount to ratifying the agreement (*k*). In England they are bound under penalty to issue a policy within twenty-one days of receiving the premium (*l*).

[* 438] **Company can ratify after loss.*—Where a policy has been effected by an agent without authority, it may be ratified by the principals even after a loss has happened. This rule is well established as to marine insurance, though it does not accord with the general principle that ratification can only be effectual when he who ratifies could at the time when he so ratified have made the original contract (*m*). And there seems no reason why the rule should not apply to insurance other than marine; but since it is mainly based on mercantile custom and convenience, it is somewhat doubtful whether it would be applied by the Courts to insurances not purely commercial. *Ratification after loss by fire in Canada.*—This has, however, been done in Canada, where it has been held that an assured could, after loss by fire, ratify a policy effected for him in a company other than that to which he had applied and the analogies of marine insurance followed (*n*).

Ratification of insurance on behalf of another.—Where a person not himself interested in a thing insures it, or directs its insurance on account of (*o*), or intends the insurance to protect the interest of, a person really interested (*p*) the latter may ratify the act of the former, and adopt the policy and take the benefit thereof (*q*); but if such an insurance was not on behalf of and ratified by another, it would be void for want of interest (*r*).

A Danish ship, after an embargo had been laid on Danish ships by an Order in Council, but before such order came to the knowledge of the captors, was captured on speculation by a British vessel *agent's authority.*—But where a policy is *intra vires*, so far as the company is concerned, though *not within the scope of the agent's authority*, the company can ratify the policy. Some policies may

(*k*) *Patterson* v. *Royal Ins. Co.*, 14 Grant (U. C.) 169.

(*l*) 33 & 34 Vict. c. 97, s. 118 (1).

(*m*) *Williams* v. *North China Insurance Co.*, 1 C. P. D. 757, 35 L. T. N. S. 884.

(*n*) *Giffard* v. *Queen Insurance Co.*, 1 Hannay (New Bruns.) 432. *Ogden* v. *Montreal Fire Co.*, 3 U. C. (C. P.) 497, a very full case.

(*o*) 14 Geo. III. c. 48, s. 2.

(*p*) *Ogden* v. *Monlreal Ins. Co.*, 3 U. C. (C. P.) 497.

(*q*) *Lucena* v. *Crawford*, 2 B. & P. 269, 1 Taunt. 325. *Wolff v. Horncastle*, 1 B. & P. 316. *Stirling* v. *Vaughan*, 11 East 619. *Routh* v. *Thomas*, 13 East 274

(*r*) *Routh* v. *Thomas* (1811), 13 East 274, 285.

of war. The prize was insured by direction of the captors in a *policy for the benefit of all concerned. The Court [*439] held that the policy enured to the benefit of the King, who had the right to adopt and did adopt the capture, and who had by the captors lawful possession of the prize, and who, if possession had been wrongfully taken, would have been bound in honour to make restitution or compensation to the injured party (*s*). If the policy had been made on account of the captors, it would have been void for want of interest (*t*), since they could only capture lawfully for the King, or the seizure was piratical (*u*).

Effect of direction to insure on another's account.—And in the same case it was decided that direction to insure property on A.'s account does not amount to an allegation that A. has interest in the property, but only to a direction to insure for the benefit of those concerned, and charge the premiums in account with the person directing the insurance. Such direction must be for those concerned, and within the scope of such an agent's agency, and in the particular case the agent was held to be an agent on behalf of the Crown, being appointed to act by servants and agents of the Crown responsible to the Crown for the captured vessel, and having themselves no interest of their own therein in respect of which they could appoint an agent (*x*).

Insurance for another without authority.—*Hagedorn* v. *Oliverson* (*y*) is an extreme instance of the same rule. The Court there decided that a man had a right to effect a policy on the chance of its being adopted, certainly for those actually interested, and possibly for those who might subsequently become interested, and that a person interested, though it was purely optional with or at most only morally binding upon him to adopt, could *by [* 440] doing so become privy to the policy and sue upon it (*z*). The man who effected the insurance and paid the premiums risked them, as he was acting outside the scope of his agency (*a*), nor could he at any time before the risk ended have recovered the premiums back, as the insurer could have answered that the persons beneficially interested were still entitled to adopt the policy (*b*).

Bailor entitled although policy without his authority and no ratification.—In America it has been held that where a warehouseman covered by insurance his own goods and others whereof he was bailee, he could not defeat an action by the bailor for a share of the insurance on the ground that he did not authorize the policy or

(*s*) *Routh* v. *Thomson*, 13 East 274, 289, per Bayley, J.
(*t*) Same case.
(*u*) Same case, p. 284, per Ellenborough, C. J.
(*x*) This was a case of constructive agency: per Dampier, J., in *Hagedorn* v. *Oliverson*, 2 M. & S at 493.
(*y*) *Ibid.*, per Bayley, J., 492.
(*z*) Same case, per Ellenborough, C. J., 490.
(*a*) Per Dampier, J., 493.
(*b*) Per Bayley, J., 492.

know till after loss that the policy existed, and failed to ratify the warehouseman's acts before loss paid (*c*).

Bailor cannot recover where policy only covers assured's loss.—But if such an insurance does not in the event cover more than the loss suffered in respect of the bailee's own goods, the bailor will not be entitled to any part of the proceeds of the policy (*d*).

Renewed policy must be conformable to the agreement to grant original policy.—If an insurance agent agrees to grant a general policy and to renew the same, the renewal refers to the original agreement, and not to a policy not conformable to the agreement, issued but not shown to the assured; and the insurers, if they have not power to grant a policy according to contract, will be liable in damages for holding out that they could (*e*).

Agents for effecting policy and adjusting loss not same.—The agents for effecting policies and for adjusting losses are not necessarily the same (*f*).

[* 441] **Agents of the assured.*—The agents of the assured are of two kinds—

(1) Those commissioned by or who undertake to obtain insurance for him.

(2) Those to whom he makes reference for purpose of information necessary for the guidance of the insurers in deciding whether they will or will not issue a policy (*g*).

The first class includes insurance brokers and other persons, *e. g.*, solicitors, and those who act for others in obtaining policies (*h*).

Agent negligently insuring himself liable.—If a party undertakes to procure or renew a policy for another, and proceeds to carry his undertakings into effect by getting a policy underwritten, but does it so negligently or unskilfully that no benefit can be derived from the intended insurance, he will be liable to an action at the suit of the person for whom he undertook the duty, even though he received no consideration for doing so (*i*).

Delay till day after agent received instructions, not negligence.—In *Dumas* v. *Wylie* (*j*), an action arising out of the Hatton Garden jewel robbery, the plaintiffs, owners of precious stones then stolen, posted at the same time as the jewels an order to insurance brokers to insure them. The broker's clerk went at half-past eleven on the next day to Lloyd's to effect the policy, but, the robbery being then

(*c*) *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. (3 Otto) 527. *Snow* v. *Carr*, 61 Ala. 363, 32 Am. Rep. 3.

(*d*) *Dalglish* v. *Buchanan*, 16 C. S. C. 332, 26 Sc. Jur. 160.

(*e*) *Albion Ins. Co.* v. *Mills*, 3 Wils. & Shaw (Sc App.) 218, 1 Dow & Cl. H. L. 342.

(*f*) See *Rokes* v. *Amazon Fire*, 51 Maryland 512.

(*g*) See per Lord Campbell in *Wheelton* v. *Hardisty*, 8 E. & B. 232, 269, 27 L. J. Q. B. 341, 31 L. T. 303, 6 W. R. 539. 3 Jur N. S. 1169.

(*h*) As to their powers, see *Xenos* v. *Wickham*, L. R. 2 H. H. 396, 36 L. J. Ex. 313, 16 L. T. N. S. 800, 16 W. R. 38.

(*i*) *Wilkinson* v. *Coverdale*, 1 Esp. 75.

(*j*) May 22, 1883, in Q. B. D.

known, the policy granted excepted any loss thereby. The jury found that the brokers had not been negligent in not sooner effecting the policy (*k*).

Failure to effect a policy which usually excepted the risk.—In Canada agents were held not liable for failing *to procure a [* 442] policy undertaking the risk of loss by improper navigation, it being proved that the usual form of policy there granted excepted such risk, and that no special instructions had been given (*l*).

Own insurer.—If a man on being requested to effect a policy says he will be is own insurer, this does not make him an insurer for the owner, nor liable as an agent who has undertaken to insure, but simply means that he will not insure his own interest in the goods (*m*).

Agent cannot receive commission from insurer and assured.—An agent to effect an insurance is not entitled to receive a commission from the insurers and the assured, and if he does so the assured may recover the amount from him (*n*), unless he has acquiesced in the receipt by the agent of such commission.

Discount belongs to principal.—If discount be allowed for prompt payment, it belongs to the principal and not to the agent (*o*)

Principal affected by fraud or misrepresentation of agent.—Misrepresentation made by the assured's agent (whether due to fraud or negligence) in procuring a policy is equally fatal, whether made with the knowledge and consent of the principal or not. since in either case the ground is the same, that the underwriters are deceived (*p*).

Notice to assured's broker.—Notice to the assured's broker will not be notice to the insurer (*q*), but the knowledge of the agent will bind his principal (*r*).

Statements of referees, &c., not analogous to those of brokers.—There is no analogy between the statement of the life or the referees in the negotiations for a life insurance and the statements by an insurance broker to *underwriters by which he induces [* 443] them to subscribe the policy (*s*).

The "life" is the agent of insured, when referred to by him.—If reference is made to the person on whose life a policy is sought for an answer to a particular question, the assured is bound by that answer, the "life" being his agent for making it, but he will not be bound by other answers in respect whereof reference was not made by

(*k*) See also *Nicol* v. *Brown*, Dict. of Decisions (Sc.), vol. xvii. p. 7089.
(*l*) *Gooderham* v. *Marlett*, 14 U. C. (Q. B.) 228.
(*m*) *Ibid.*
(*n*) *Copp* v. *Lynch* (1882), 26 S. J. 348, 361.
(*o*) *Queen of Spain* v. *Parr*, 39 L J. Ch. 73.
(*p*) *FitzHerbert* v. *Mather*, 1 T. R. 12; and see per Story, J, *Carpenter* v. *American Insurance Co.*, 1 Story Rep. 57.
(*q*) *M'Lachlan* v. *Etna*, 4 Allen (New Bruns.) 173.
(*r*) *Lynch* v. *Dunsford*, 14 East 494.
(*s*) *Wheelton* v. *Hardisty*, 8 E. & B. 232, 270, per Campbell, C. J., 27 L. J. Q. B. 241, 5 W. R. 784, 6 W. R. 539, 31 L. T. O. S. 303, 3 Jur. N. S. 1169.

him (*t*), nor by the non-disclosure of material facts by "the life," of which insurers and assured are equally ignorant (*u*), and as to which the assured has not been asked.

But a general reference to "the life" will make him the assured's agent (*x*) in obtaining the policy, and any fraud, misrepresentation, or concealment by him will defeat the policy (*y*). It is usual, however, now to insist on answers by the life and to have them warranted.

Medical man as agent.—Reference to a medical man falls under the same rules, and his representations as to the health of the life bind the assured if material, and if warranted even when immaterial, and this even though the insurer's medical officers may have examined the life or have been informed by him of the matter in question (*z*).

Authority of broker employed to procure insurance.—The authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement [* 444] of the policy; therefore where a policy was subject to *cancellation on notice, and provided that any person, other than the assured, procuring the policy should be deemed an agent of the assured, it was held that notice of cancellation to the brokers who procured the policy, the assured being ignorant of such notice, was of no effect (*a*) (9) (10).

(*t*) *Wheelton* v *Hardisty, ubi supra*

(*u*) *Ross* v. *Rradshaw*, 1 Wm. Bl. 312, 2 Park Ins. 934 (8th ed.).

(*x*) *Maynard* v. *Rhode*, 5 Dowl. & Ry 266, 1 C & P. 360, and cases discussed by Campbell, C. J., in *Wheelton* v. *Hardisty*, 8 E. & B. 232, 271 *sqq.*

(*y*) *Forbes* v. *Edinburgh Life Assurance Co*, 10 C. S. C. (1st series) 861 (1832).

(*z*) *Connecticut Mutual Life Insurance Co.* v. *Moore*, 6 App. Cas. 644.

(*a*) *Hermann* v. *Niagara Fire Co.*, 53 Am. Rep. 197, 55 Sickell, (N. Y.) 411. *Hodge* v. *Security Ins. Co.*, 33 Hun. (N. Y.) 583. *Von Wein* v. *Scottish, &c., Co.*, 52 N. Y. (Sup. Ct. Rep.) 490.

9 An agency to procure insurance is not, as matter of law, presumed to continue for the purpose of cancelling an insurance procured, or of receiving notice of such cancellation. *Broadwater* vs. *Lion Fire Ins. Co.*, 34 Minn. 465.

10 Policy of insurance cannot be cancelled without notice to the assured or his agent authorized to receive such notice. *Lancashire Ins. Co.* v. *Nill*, 114 Pa. St. 248.

CHAPTER XXV. [445]

ACCIDENT.

Accident insurance.—Accident insurance is a branch of life insurance by which persons are enabled to provide against loss to themselves or their families in case they are injured or disabled for a time or permanently, or killed by some one or other cause operating on them from without. Ordinary life insurance affords no provision for the assured's family in any cases short of his death or of his reaching a given age. And while friendly societies supply a mode of insuring against disability through sickness, accident insurance guarantees a man against the consequences of disability through falls and personal injuries not caused by disease or the wilful act of the person insured.

Accidental policy not contract of indemnity.—A policy of insurance against accidents as usually drawn is not a contract of indemnity. Alderson, B., said, "This is not a contract of indemnity because, a person cannot be indemnified for the loss of life as he can in the case of a house or shop" (*a*).

Consequently, if the accident be caused by the wrongful act of a third person, it would seem that the insurers are not entitled either to deduct from the amount paid by them anything recovered by the assured from the tortfeasor, and that they are not subrogated to his rights against the tortfeasor (*b*).

The tortfeasor cannot claim to have the amount *recov- [* 446] ered from the insurers deducted from the damages which he has to pay (*c*).

Death from negligence. Lord Campbell's Act.—But if the assured is killed by an accident resulting from negligence, and an action is brought by his relatives under Lord Campbell's Act for the loss they have sustained, such loss is to be calculated with reference to any insurance on his life (other than with the Railway Passengers' Assurance Company), and the amount of the insurance-money should be deducted from the damages recovered (*d*).

(*a*) *Theobald* v. *Railway Passengers', &c., Co.*, 10 Ex. 45, 53, per Alderson, B., 23 L. J. Ex. 249, 23 L. T. 222, 18 Jur. 583, 2 W. R. 528.

(*b*) 27 and 28 Vict. cap. cxxv. s. 35. And see the judgments in *Bradburn* v. *Great Western Railway*, L. R. 10 Ex. 1.

(*c*) *Bradburn* v. *Great Western Railway*, *supra*; but see *Liverpool Plate Glass Co.* v. *Pelletier*, 75 L. T. Journ. 304.

(*d*) *Hicks* v. *Newport Railw. Co.*, 4 B. & S. 403 n. *Franklin* v. *S. E. R.*, 3 H. & N. 211; and per Bramwell, B., in *Bradburn* v. *G. W. R.*, *supra*.

Assured's rights against third person preserved.—But by the Railway Passengers' Assurance Companies Act, 1864 (*e*), it is enacted that no contract of the company nor any compensation received or recoverable by virtue of any such contract, either under this Act or otherwise, shall prejudice or affect any right of action, claim, or demand which any person or his executors or administrators may have against any other company or any person, either at Common Law or by virtue of the Act passed in the session of the 9th and 10th years of her present Majesty, intituled "An Act for compensating the Families of Persons killed by Accident," or of any other Act of Parliament, for the injury, whether fatal or otherwise, in respect of which the compensation is received or recoverable.

Nature of policy.—In some of the earlier English (*f*) cases of accident insurance, the policies have been drawn, to some extent at least, as contracts of indemnity. Thus in *Theobald* v. *Railway Passengers' Assurance Company* (*g*), where the contract was to pay £1000 to the executors of the assured on his death, or a [* 447] proportionate part to himself *in case of personal injury, and the assured was injured, the Court of Exchequer held that the insurers were bound to indemnify the assured for the costs of the medical attendance and expenses to which he was put by the accident, but not for loss of time or profits, thus following the rule of *Wright* v. *Pole* (*g*) that profits can be recovered under a policy unless insured in terms. And Pollock, C. B. (*h*), said "What the insurance company calculate on indemnifying against is the expense and pain and loss immediately connected with the accident, and not remote consequences that may follow according to the business of the passenger."

In this case there were clearly two distinct contracts—

(1) To pay £1000 to the assured's *executors* if he were killed by accident.

(2) To compensate *him* to any amount, not exceeding £1000, for the expense and pain and loss caused to him by accident. The first contract was to pay the representatives of the insured a liquidated sum in a certain event, the second to compensate the insured himself up to £1000 in a certain other event. And the view of Alderson, B. (*i*), "that no proportion could exist between injuries short of death, and death," well expresses the essential difference of the two contracts, and the impossibility of establishing a ratio between the two events provided against. *Form and nature of accident policy.*—The private Act of the insurers (*j*) contained the form of con-

(*e*) 27 & 28 Vict. cap. cxxv. s 35.

(*f*) And see, in America, *Hill* v. *Hartford Ins. Co.*, 22 Hun. (N. Y.) 187, 190, per Follet, J. "The central idea of such a policy is partial indemnity against accident."

(*g*) 10 Ex. 45, 23 L. J. Ex. 249, 23 L. T. 222, 18 Jur. 583, 2 W. R. 528. 12 & 13 Vict. cap. xi.; 15 & 16 Vict. cap. c.

(*g*) *Ante*, p. 41.

(*h*) *Theobald* v. *Railway Passengers, &c. Co.*, 10 Ex. 58.

(*i*) *Ibid.* (*j*) 15 & 16 Vict. cap. c.

tract adopted in the above case. But at present the usual form of an accident policy is to pay a certain fixed sum per week in case of injury, and a certain other fixed sum in case of death. Such policies do not contemplate indemnity, and avoid the necessity of going into the assured's accounts or private affairs.

**Assured not under twelve years.*—Insurance against accident [* 448] while traveling by railway may not be affected with the Railway Passengers' Assurance Company, by or on behalf of any one under twelve years of age, and every insurance ticket obtained by or on behalf of such person shall be utterly void against the company (*i*).

Insurance by friendly societies.—Insurance by friendly societies against accidents generally is open to all over sixteen in the ordinary course (*k*), and to still younger children under certain special conditions prescribed by the Friendly Societies Act, 1875 (*l*).

Insurable interest requisite.—The rules as to its being necessary for the person effecting a policy against accidents to have an insurable interest in the health or life of the assured, are the same as for all other insurances, under 14 Geo. III. c. 48 (*m*), which statutes provides that it shall be competent to show that the policy was in fact made on account of a person other than the person with whom it is expressed to be made (*n*).

Accident time policies.—Accident policies, like marine policies, may be divided into time policies and voyage policies. The former, like ordinary life policies, are made by the year or for life, and only differ from them in the nature of the risk insured against. They cover all forms of accident, irrespective of the place where the assured is. But it is not unusual to limit the area within which the accident is to happen; thus in a recent case the policy provided against accidents within the United Kingdom or the continent of Europe, and that it should be avoided as soon as the assured took ship to go outside those limits. The assured was killed in Jersey, *and the insurers disputed their liability, on the [* 449] ground (*inter alia*) that Jersey was neither in the United Kingdom nor on the continent of Europe (*o*).

Voyage policies may or may not be limited in point of time. Thus, a railway insurance against accident is only available for so many days, and if the journey is protracted beyond those days, the policy ceases to be available. It is always limited in point of space to a prescribed journey, and a passenger insured from London to Aberdeen, with liberty to break the journey given him by the railway company, would not be insured against accidents happening to him if he chose to go to Scarborough in the time allowed

(*i*) 27 & 28 Vict. cap. cxxv. s. 84.
(*k*) Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 8.
(*l*) 38 & 39 Vict. c. 60, s. 8 (*a*).
(*m*) *Shilling* v. *Aicidental Death Co.*, 1 F. & F. 116, 2 H. & N. 42, 26 L. J. Ex. 268, 27 do. 17, 29 L. T. 98, 5 W. R. 567.
(*n*) Same case.
(*o*) *Stoneham* v. *Ocean, &c., Co.*, 3 Times L. R. 695.

him at York, for though traveling he would be deviating from the journey for which he was insured. It would, however, probably be otherwise if his train, through some accident or negligence of the railway company, deviated on to a branch line and he was there injured.

Railway accident definition.—Alderson, B. (*p*), defined a railway accident to be "an accident occuring in the course of travelling by a railway, and arising out of the fact of the journey. It does not necessarily depend upon any accident to the railway or machinery connected with it;" but Pollock, C. B. (p. 57), declined to lay down any general rule. He, however, in the case before the Court laid emphasis on the following facts, viz.:—(1) The plaintiff was a traveller on the railway. (2) Though at the time of the accident his journey had in one sense terminated by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still in it. (3) The accident happened without negligence on his part, and while he was doing an act which as a passenger he must necessarily have done, for a passenger must get into the carriage, and get out of it when the journey is at an end, and cannot [* 450] be considered as disconnected *with the carriage and railway, and with the machinery of motion, until the time he has, as it were, safely landed from the carriage and got on the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such passenger."

Breaking journey.—Where the journey insured for is not wholly without break, and in the same conveyance, the policy will it would seem, cover passage from railway to steamer or from one conveyance to another (*p*). But where the insurance is by public or private conveyance between two points, and the assured finds no conveyance at a certain stage of his journey and tries to complete it on foot, he will, it seems, not be protected (*q*).

Insurance ticket for particular journey.—Insurances against railway accident are usually effected by ticket, purchased at a station like a railway ticket. The contract for such insurance is effected by the sale and purchase of such ticket from the proper person (usually the ticket officer of the railway company). By the Railway Passengers' Assurance Company's Act, 1864 (*r*), s. 6, it is provided that in all cases, tickets of insurance for particular journeys shall be held to be a valid execution by the company of the contract set out in the schedule thereto, and that nothing further shall be required to be done by the company in order to legally bind the company to the performance thereof. This mode of contracting is subject to a disadvantage, that the assured is not identified, and may give away his ticket without much danger of discovery, although to do

(*p*) *Theobald* v. *Railway Passengers'*, 10 Ex. 58, *supra.*
(*p*) See *Northrup* v. *Railway Passengers' Assurance Co.*, 43 N. Y. 516.
(*q*) *Southard* v. *Railway Passengers' Assurance Co.*, 34 Conn. 574.
(*r*) 27 & 28 Vict. cap. cxxv.

so is a misdemeanour and avoids the contract made by the ticket (*s*).

Assured must be twelve years of age.—The contract in the said schedule is to pay to any person over the age of twelve who has duly, and for the premium demanded, obtained one of the company's *insurance tickets, and sustains an injury caused by [* 451] an accident to the train or to the carriage while travelling during the particular journey for which the ticket is issued.

Amount of compensation.—The compensation payable is as follows, viz:—Where the amount payable in case of death is £1000, and the assured is not killed, but totally disabled, he is entitled to £6 per week, but if partially disabled to £1 10*s.* per week. If the sum insured in case of death is £500, and the assured is not killed, but totally disabled, he is entitled to £3 per week, but if partially disabled to 15*s.* per week. If the sum insured in case of death is £200, and the assured is not killed, but totally disabled, he is entitled to £1 5*s.*, but if partially disabled to 6*s.* 3*d.* per week. But the Act provides different rates for excursion trains. If there be contributory negligence in the assured he cannot recover, and if any claim is fraudulent the company may recover back the money paid (*s*).

This form of contract by ticket issued on demand and tender of the proper premium is possible for the insurer, because the risk to be run is calculable beforehand, and the occupation, age, and habits of the assured can very seldom increase the probability of an accident happening while the assured is traveling. But where drunkenness or an affliction increasing liability to accident is apparent in the applicant, the railway company would have a right to refuse to issue an insurance ticket to him; the words of the statute are permissive, not obligatory (*t*)

Time policy against accident. Insurer not obliged to continue.—Time policies against accident are effected in the same way as ordinary time policies, on the basis of a proposal and declaration signed by the applicant, containing such information as the insurers deem necessary and good faith requires. But there is no obligation in *the insurer to continue an accident policy, as there [* 452] is in the case of a life policy (*u*).

What must be stated in proposal for accident policy.—A man seeking insurance against accident will be bound to disclose any circumstances of which he is aware which he thinks would make the insurers decline to insure him or charge a higher premium, as for an increased form of risk.

The applicant is required to declare that he is in good health at the time of application; that he has never had a fit of any kind, or

(*s*) *Ibid.*

(*s*) 27 & 28 Vict. cap. cxxv., s. 3, and sched.

(*t*) *Ibid*, s. 4.

(*u*) 27 & 28 Vict. cap. cxxv., s. 4. *Simpson* v. *Accidental Death*, 26 L. J. C. C. P. 289, 30 L. T. 31. For form of such, see 2 C. B. N. S. 257, 5 W. R. 307, 3 Jur. N. S. 1079.

paralysis, or gout, or *delirium tremens;* that he has no rupture, physical defect, or deformity; that his habits are at the time of application, and have always been, sober and temperate, and that there is nothing in his occupation, mode or habits of life rendering him peculiarly liable to accident, and that he knows of nothing which he thinks would make the insurers unwilling to take his risk; and this declaration, with certain specific answers, is made the basis of the contract, and if they are not in all respects true, the policy will be voidable, and all premiums paid thereunder subject to forfeiture.

Questions put to proposed insured.—The particular questions put are of the following kind. (1) As to occupation. (2) As to previous accidents (if any) requiring medical or surgical attendance, with particulars (if any). (3) As to previous or subsisting assurances against accident. (4) As to refusal to accept proposals or renew policies. (5) As to compensation (if any) received for personal injury.

Even if this declaration were not made, nor these questions asked, most of the information warranted therein would be requisite under the general principles of insurance law, especially that relating to his physical condition. For certain ailments and [* 453] accidents diminish *a man's control over his movements, and increase his liabilities to accidental injuries.

The risk also varies to some extent according to the trade or calling of the insured, and the insurers divide occupations into several classes, according to the greater or less liability to accident found on the average to be attendant on such occupations.

Assured must truly state occupation.—The person seeking insurance is, as has been said, usually asked to state his profession or occupation. If he state it falsely, the policy will be void by its terms under the rule in *Anderson* v. *Fitzgerald* (*x*), whether the profession or occupation stated be more or less hazardous than or as hazardous as the real occupation of the assured (*y*).

Ironmonger described as esquire.—Description by the assured of himself as an esquire is no answer to a question as to profession or occupation (*z*), but a mere representation that the assured is in that position of life in which people are usually styled esquires (*a*). Where a man being engaged in trade as an ironmonger calls himself an esquire, and says nothing about the trade, this does not amount to a statement false in fact. At most he has not stated all he might have stated. But this only makes his statement imperfect, not untrue (*b*), and the Court will not deem such an omission to be a *suppressio veri* or *suggestio falsi.*

(*x*) 4 H. L. C. 484, 17 Jur. 995.

(*y*) See *Perrins* v. *Marine, &c.*, 2 E & E. 317, 29 L. J. Q. B. 17, 242, 2 L. T. N. S. 633, 6 Jur N. S 69, 627, 8 W. R. 41, 563.

(*z*) Per Hill, J., in *Perrins* v. *Marine, &c.*, 2 E. & E. 317, at 321.

(*a*) Per Williams, J., in same case, 324 (*Cam scac.*).

(*b*) Per Wightman, J., in same case, 323.

Cockburn, C.J., however, dissented from the decision, and considered by calling himself esquire the ironmonger virtually described himself as of no occupation, and conveyed the impression that he was not in trade (*c*).

Accident definition.—Many of the questions on accident policies arise concerning the true meaning of the word accident, and *it is difficult so to define the word as to include the [* 454] innumerable mishaps which happen in the daily course of human life; and it is often equally difficult to decide whether a mishap comes within the risk taken, or the exceptions made, by the terms of a particular policy.

In *North American Life and Accident Co.* v. *Burroughs* (*c*) accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency."

Sunstroke.—In *Sinclair's Case* (*d*) accident was defined as including violence, casualty, and *vis major*, but not as including sunstroke, which the Court classed with injuries from malaria, exposure to the weather, &c. It is a known consequence of undue exposure to the full heat of the sun, and in no way to be classed with the unforseen, though it operates *ab extra*.

Accident and resulting injury distinct.—The injury and the accident causing it are distinct, and must not be confounded. A man may be accidentally poisoned, and his death in that case results from something unforseen in the course of nature, which does not operate externally, but the introduction of which into the system is *ex hypothesi* a pure accident. If such a case happened, unless death by poison were excepted, the insurers would probably be liable. The accident would be the fortuitous reception of the poison into the body. The injury would be the natural result of the poison when so received, and would thus be the effect of which the accident would be the cause.

Rupture by jumping from train.—American decisions go somewhat far in restricting the definition of accident, following out the distinction already indicated between the accident and injury. Thus it has been held that rupture caused by jumping *from a railway train before it had stopped was not a [* 455] bodily injury effected through violent and accidental means, on the ground that the rupture was the result and not the means, and that the injured man meant to jump down and did so, and that nothing unforeseen happened in jumping down (*e*).

Injury from putting arm out of window.—In Kentucky (*f*) a man

(*c*) P. 321.
(*c*) 8 Am. Rep. 216.
(*d*) *Sinclair* v. *Maritime Passengers'*, 3 E. & E. 478, 4 L. T. N. S. 15, 30 L. J. Q. B. 77, 9 W. R. 342, 7 Jur. N. S 367.
(*e*) *Southard* v. *Railway Passengers' Assurance*, 34 Conn. 574.
(*f*) *Morel* v. *Mississippi Valley Life*, 4 Bush. (Ky.) 535.

who put his arm out of window and got it injured against a post was held disqualified by negligence (*g*). The true question would be rather whether the act was necessarily connected with the travelling, and negligence would have nothing to do with the matter (*h*). Putting out the arm to close a door inadvertently left unfastened by the company, or to catch something blown by the draught out of the carriage, would seem to be acts arising out of the journey. But it might be otherwise where a man put his arm out merely to feel the air or the rain. *Negligence of assured.*—Such an act, whether negligent or not, would not arise out of any act immediately connected with the journey.

Fatal fall whilst running to catch train.—Where a man ran to catch a train, and missing a step fell and was killed, in America, it was held that actual travelling included the necessary getting into the train (*i*).

Drowning.—*Drowning* is an accidental injury (*k*) within a policy providing that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means of which satisfactory proof could be supplied to the directors.

[* 456] **Assured found in water.*—When a man is found dead in the water, he may be presumed to have come to his death by drowning and not by fits. Even if he fell into the water in a fit and got drowned, the insurer would be liable, as death would be caused by the action of the water and not by the fit (*l*).

Presumption against suicide.—If a man might have come to his death by accidental drowning or suicide, the presumption will be in favour of accident rather than intention (*m*).

Falling on railway.—If a man is seized with a fit and falls on to a railway line on which a train is coming, and is so run over, the cause of death will not be the fit, but the being run over (*n*).

Sprain.—The assured sprained the muscles of his back in lifting a heavy weight, and was held entitled to recover under a proviso that the injury must be due to a material or external cause operating upon the person of the insured (*o*).

Policy against death by accident whilst travelling.—The assured left a

(*g*) Railway Passengers' Assurance Co.'s Act, 1852 (15 & 16 Vict. cap. c., s. 133), provides that negligence may be insured against by that company.

(*h*) See *Champlin* v. *Railway Passengers'*, 6 Lansing (N. Y.) 71, holding that contributory negligence is no defence on a policy of accident insurance.

(*i*) *Tooley* v. *Railway Passengers' Assurance Co.*, 3 Bliss. (U. S. Circ. Ct.) 399.

(*k*) *Trew* v. *Railway Passengers'*, 6 H. & N. 830, 30 L. J. Ex. 317, 4 L. T. N. S. 833, 9 W. R. 671, 7 Jur. N. S. 878. *Reynolds* v. *Accidental*, 22 L. T. N. S. 820, 18 W. R. 1141.

(*l*) *Winspear* v. *Accidental*, 6 Q. B. D. 42, 43 L. T. 459, 29 W. R. 116.

(*m*) *Mallory* v. *Travellers'*, 47 N. Y. 52, 7 Am. Rep. 410

(*n*) *Lawrence* v. *Accident Co.*, 7 Q. B. D. 216, 50 L. J. Q. B. 522, 29 W. R. 802 (1881).

(*o*) *Sinclair* v. *Maritime Passengers' Insurance Co.*, 4 L. T. N. S. 15, 30 L. J. Q. B. 77 3 E. & E. 478, 7 Jur. N. S. 367. *Martin* v. *Travellers' Co.*, 1 F. & F. 505.

steamer to walk home, and while so doing was injured by an accident from which he died. The Supreme Court of the United States held that his own legs were not a conveyance, public or private, within the meaning of a policy against death by accident whilst travelling by public or private conveyance (*p*).

Exercise with clubs, rupture of blood-vessel.—In America, death caused by rupture of a blood-vessel while exercising with Indian clubs is not accidental death if the clubs were used in the ordinary way, and no unforseen accident, unusual circumstance, or involuntary movement of the body occurred which in *con- [* 457] nection with the movement of the body brought about the injury (*r*).

Rupture of blood-vessel, inflammation of lungs.—If death is due to inflammation or abscesses on the lungs, consequent upon the rupture of a blood-vessel by over-exertion, such rupture will be held the proximate cause of death and the death accidental, unless independent lung disease supervened before the rupture, or slumbering disease was brought into activity by the rupture (*s*).

Death must be caused solely by accident to entitle assured.—It is usually stipulated that death must be caused solely by accident to entitle the representatives of the assured to recover under the policy. If death is caused by peritonitis due to a violent and unintentional blow in the stomach, this has been in America held to be death by accident (*t*). So also in the case of hernia due to an accidental fall (*u*) [1].

But where erysipelas supervened upon a wound, the death that followed was considered to be the result of the disease rather than of the wound, and it was held that the insurers were not liable (*v*) under the special terms of their policy. But gangrene from a cut has lately been held an accident within the meaning of a policy against accident (*w*). But death by dislodgment of a gaul-stone consequent on a fall has been held not within a policy against death by accident (*x*).

Death under doctors' hands.—Death under surgeons' or physicians' hands is excepted in most if not all accident policies. In America it has been held that death caused by taking accidentally an overdose of opium, a proper dose having been prescribed, is within this exception (*y*).

(*p*) *Ripley* v. *Insurance Co.*, 16 Wall. (U. S.) 336.

(*r*) See *M'Carthy* v. *Travellers'*, 8 Biss. (C. Ct. U. S.) 362, U. S. Dig. 1882, p. 496.

(*s*) Same case.

(*t*) *N. Am. Life, &c.*, v. *Burroughs*, 69 Penn. 43, 8 Am. Rep. 212.

(*u*) *Fitton* v. *Accidental Death*, 17 C. B. N. S. 122, 34 L J. C. P. 28.

(*v*) *Smith* v. *Accident, &c., Co*, L. R. 5 Ex. 302, 39 L. J. Ex. 211, 22 L. T. N. S. 861, 18 W. R. 1107.

(*w*) *Waller* v. *Northern, &c.. Co., Times*, Jan. 26, 1887.

(*x*) *Cowley* v. *National Employers' Co.*, 1 Times L. R. 255.

(*y*) See May Ins. (1st ed) 784.

[1] Death from bodily injury may include death from apoplexy caused by bodily injury. *National Benefit Assn.* v. *Grauman*, 107 Ind 288.

[* 458] **Usual exception in accident policy.*—These policies usually contain a clause to the following effect, "but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause arising within the system, before, or at the time of, or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury." In the case of *Smith* v. *Accidental Death Company*, which has just been cited, the Court of Exchequer held (Kelly, C. B., dissenting), in construing such a policy, that erysipelas resulting from, and caused solely and exclusively by, an accidental injury in the foot of the insured came expressly within this exception, and that therefore the insurers were not liable on the policy.

Hernia—operation.—But where hernia caused solely by eternal violence was followed immediately by a surgical operation which was intended to relieve the patient, but caused death, the Common Pleas held that such a case did not come within the exception (*y*), and therefore the insurers were liable.

Overdose of medicine by mistake not within condition.—Death from an overdose of medicine by mistake is within a policy against death by accident "conditioned to be void if he die by his own hand or act voluntary or otherwise," the aim of the condition being merely to cover the varieties of suicidal self-destruction (*z*). Taking an overdose of laudanum to relieve pain is not within such clause (*a*).

Driving in vehicle.—Driving the assured out in a vehicle is not a voluntary exposure to an obvious risk (*b*).

Own negligence covered by policy.—The consequences of a man's own negligence may be insured against, and are insured against unless expressly excepted.

[* 459] **Standing on joist which broke.*—Where the policy required that the assured should use due diligence, and he stood on a joist on the second floor of a building which was being erected for him, and it broke, and he fell and was killed; in America this has been held no want of due diligence (*c*).

Consequences of wilful exposure to unnecessary danger, or peril, are by some policies excepted from the risk.

Fatal fall by engine-driver putting on brake.—Where an engine-driver slipped, fell, and was killed while going into the tender to put on the brake, which is the stoker's business, he was held not to have been needlessly exposing himself (*d*).

Attempting to mount carriage in motion.—In America the Courts

(*y*) *Fitton* v. *Accidental Death Co.*, 17 C. B. N. S. 122, 34 L. J. C. P. 28, discussed in previously cited case.

(*z*) *Penfold* v. *Universal Life Co.*, 85 N. Y. 317, 39 Am Rep. 660. And see *Pollock* v. *U. S. Mutual Co.*, 48 Am. Rep. 204.

(*a*) *Mutual Life Co.* v. *Laurence* 8 Illinois (App.) 488.

(*b*) *Shilling* v. *Accidental Death*, 1 F. & F. 116, 2 H. & N. 42, 26 L. J. Ex. 266, 27 do. 16, 29 L. T. 98, 5 W. R. 567.

(*c*) *Stone* v. *U. S. Casualty Co.*, 34 N. Y 371.

(*d*) *Providence Life* v. *Martin*, 32 Maryland 310.

have gone so far as to hold that an attempt to get into a railway carriage whilst in slow motion is not wilful and wanton self-exposure to unnecessary danger (*e*). Assured took a ticket from A. to B.; when the train reached B. he got out, and the signal was given for it to proceed to C., and the train had begun to move. Assured then attempted to get in whilst the train was in motion, and was killed. It was held natural and prudent for a man who wanted to go in the train, to get in while it was moving, and that the insurers were therefore liable (*f*). *Jumping on omnibus in motion.*—An assured who jumped on the step of an omnibus in motion, intending to travel by it, fell, and was injured, and he was held entitled to recover on a policy against accident while travelling by public or private conveyance (*g*).

A policy of insurance against death or injury issued by a railway passenger assurance company provided,—

(1) No claim for insurance shall be made when death or injury may have happened in consequence of *voluntary [* 460] exposure to unnecessary danger, hazard, or perilous adventure (*g*).

(2) Standing, riding, or being upon the platform of moving railway coaches, or entering, or attempting to enter, leaving or attempting to leave, any public conveyance, having steam as a motive power, while the same is in motion, are hazards not contemplated by the contract.

Passing from car to car is exposure to unnecessary danger.—This condition (2) will not include mere passing from one part to another of a train through which a passage was possible and contemplated, but such passing is exposure to unnecessary danger within condition (1), especially if it be done at night (*h*).

Meaning of "wholly disabled."—Where insurance is effected against an accident wholly disabling the assured, the necessary condition for compensation thereunder is proof that an accident has so far disabled the assured that he can no longer follow his occupation, business, and pursuits in the manner in which he usually carried it or them on before (*i*). It is not necessary to prove that the assured cannot do any part of his business (²).

The American policies, to avoid these questions, seem to insert total disability from *all* business. In England, loss of both eyes, or of both legs, or of both arms, or of one of each, are by certain accident insurance companies treated as total disability.

What notice to be given of accident.—Notice of an accident must be

(*e*) *Schneider* v. *Provident Life*, 24 Wisc. 28.
(*f*) *Tooley* v. *Railway Passengers'*, *&c.*, *Co.*, 8 Biss. (U. S.) 399.
(*g*) *Champlin* v. *Railway Passengers'*, 6 Lansing (N. Y.) 71.
(*g*) *Burkhard* v. *Travellers' Co.*, 48 Am. Rep. 205.
(*h*) *Sawtelle* v. *Railway Passengers' Assurance Co*, 15 Blatch. (C. Ct. U. S.) 216.
(*i*) *Hooper* v. *Accidental Death Co*, 3 L. T. N. S. 22, 5 H. & N. 557, 29 L. J. Ex. 484, 7 Jur. N. S. 74; same case, per Wilde, B., at 5 H. & N. 546.
² See *Saveland* v. *Fidelity & Casualty Co.*, 67 Wisconsin 174.

given as stipulated in the policy, usually to the head office within fifteen days of its occurrence (*k*), even when the assured is [* 461] killed instantaneously (*l*). But unless this notice is *made a condition precedent to liability under the policy, the Courts will not hold delay fatal to all claim, but merely visit the claimant with the costs (if any) occasioned by delay (*k*).

Notice of instant death.—And where a policy against accident was made subject to a condition that, in the event of any accident to the assured, he or his representatives should give notice thereof in writing to the company within ten days after its occurrence, and that unless the condition were complied with no person should be entitled to claim under the contract, it was held that notice must be given within the prescribed time even of instantaneous death, and that such notice might be given by any person appointed by the assured for the purpose (*l*), or even by any person acting on behalf of the persons interested in the policy (*m*).

Where accident eventually results in death, and weekly payments made, balance after deducting them is payable.—Where an accident happens disabling for some time, and finally resulting in death within the period mentioned in the policy, only the balance remaining due on the policy after paying the weekly allowances for the period of survival after the accident will, it seems, be payable.

Death must ensue within specified time.—When the policy insures against fatal accidents, to entitle the representatives of the insured to recover, death must ensue within the time mentioned in the policy, usually three calendar months after the accident (*n*). Proof must be given of the death [3] to satisfy (*i. e.*, which ought to satisfy) the directors (*o*), and the claim is usually made payable within one month after such satisfactory proof [4]. Evidence on which the Court may deem a tenant for life to be dead is not neces- [* 462] *sarily satisfactory proof of his death to an insurance company with whom his life was insured (*p*).

(*k*) *Gamble* v. *Accident Ins. Co.*, 4 I. R. C. L. 204.

(*l*) *Patton* v. *Employers' Liability Co.*, 20 L. R. Ir. 93. *Cassel* v. *Lancashire and Yorkshire Co.*, 1 Times L. R. 495.

(*k*) *Stoneham* v. *Ocean Co.*, 3 Times L. R. 695.

(*l*) *Patton* v. *Employers' Liability Assurance Corporation, supra.*

(*m*) *Ibid.*, per Murphy, J.

(*n*) *Lockyer* v. *Offley*, 1 T. R. 260, per Willes, J. *Perry* v. *Provident Life*, 99 Mass. 162. *Same* v. *Same*, 103 Mass. 242.

(*o*) *London Guarantee* v. *Fearnley*, 5 App. Cas. 916, 43 L. T. R. S. 390, 28 W. R. 893.

(*p*) *Doyle* v. *City of Glasgow, &c., Co.*, 53 L. J. Ch. 527, 50 L. T. 323, 32 W. R. 476.

[3] Denial of all liability is a waiver of the right to require proofs of death. *Kansas Protective Union* v. *Whitt*, 36 Kan. 760.

[4] The agent who acted in effecting insurance, assured to act as the agent in receiving proofs of death. The company, by its acts, recognized the agency. Held, that agents' acts bound company. *Travellers Ins. Co.* v. *Edwards*, 122 U. S. 457.

Allowance for disablement twenty-six weeks.—Allowance for disablement is usually limited to twenty-six weeks for any one accident and in respect of any one year's premium.

True construction of accident policy.—Where an accident policy insures against two classes of injuries, namely, those which occasion loss of life within a certain period, and those which shall not be fatal, and contracts to pay in the former case an agreed lump sum at death, and in the latter case a certain sum per week, the two provisions are to be construed together, and the evident intent is that if an injury happens within the meaning of the policy it is insured against as coming within one class or the other. If it were otherwise construed, an injury which should not prove fatal within the specified time would furnish no ground of action till it should be made to appear that it would never prove fatal. This would render the insurance nugatory in such cases (*q*).

A policy runs for fifteen days after the renewal premiums become due, and the insurers are liable for that period. But, unlike life policies, accident policies may be discontinued, and, if notice to do so be given before the end of the year, the assured will not be entitled to the days of grace any more than in fire policies (*r*).

Proof of accident to satisfy directors.—Where the policy requires that such proof of the accident alleged as ground of claim shall be given as the directors shall deem necessary to establish the claim, it will be construed as demanding what they shall deem reasonably necessary (*s*).

**Employers' Liability Act.*—Employers of labour are [* 463] now by statute (*t*) made liable for accidents of certain kinds to their servants. In respect of such liability they have an insurable interest in the life of every *employé* up to the limit of compensation provided by that Act.

The Railway Passengers' Assurance Co. has by a private Act (*u*) taken special powers to insure the liability of employers against their liability under the Employers' Liability Act, and other companies have been constituted for the same purpose under the Companies Acts.

Insurers against employers' liability require to know the nature of the business in which the liability is to be incurred, the number of persons employed, the mode of conducting the business, and the amount of wages paid (on which the premiums are calculated). In a very recent case a question has arisen as to which a difference of opinion exists. The case was as follows:—

Unusual operation by workmen performed by employers' direction.—An unexploded shell brought from Alexandria, mistakenly be-

(*q*) *Perry* v. *Provident Life*, 99 Mass. 162. *Same* v. *Same*, 103 Mass. 243.

(*r*) See *Salvin* v. *James*, 6 East 571.

(*s*) *Braunstein* v. *Accidental Death*, 31 L. J. Q. B. 17, 5 L. T. N. S. 550, 1 B. & S. 782, 8 Jur. N. S. 506. See *Manby* v. *Gresham Life*, 4 L. T. N. S. 347, 9 W. R. 547, 31 L. J. Ch. 94, 29 Beav. 439, 7 Jur. N. S. 383.

(*t*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*u*) 44 & 45 Vict. cap. xli.

lieved to be spent, was sent to a gun-making company for the purpose of cutting it with machinery which they had made for other purposes, but which was the best for the purpose desired. Before the shell was cut it was discovered to contain gunpowder. A workman was told to clear out the powder, and while he was so doing the shell burst and injured him, and he recovered compensation from his employers, who were insured in respect of their gunmaking business and their statutory liability to their *employés*. The policy contained a warranty against explosives, and when the employers sued the insurers for the indemnity the insurers pleaded this breach of warranty, and, further, that the man was not when injured engaged in the ordinary work of the employers as described in the policy. The employers obtained judg-
[* 464] ment at the *trial, but the Divisional Court was divided on the question whether the particular accident was within the policy (*x*). The Court of Appeal, however, unanimously held that the accident was covered by the policy (*y*).

Insurers may exclude risk arising from change of trade.—Apart from the circumstances of the particular case, it is clear that the insurers are not bound to take the risks of a change in the trade, or the mode of conducting it, and can by apt words exclude such risk.

Contract of indemnity.—It may be observed that this form of ininsurance, though on human life, is merely a contract of indemnity against a legal liability.

Employer must defend if required by insurer to do so.—The employer will be obliged to defend an action by the workman if the insurer requires, and if he does so on the request of the insurer, or otherwise reasonably, he will be entitled to recover all the cost which such defence has put him to, as in the case of re-insurance (*z*).

"*Manual labour*," *English and Scotch opinion divergent.*—But paying without liability will not entitle the employer to indemnity unless the insurers advised payment. And the liability, to be enforceable against the insurers, must be not only one which falls on the employer within the statute (otherwise the employer would have insurable interest), but also within the policy. Thus, in consequence of the different interpretation put by English (*a*) and Scotch (*b*) Courts on the words "manual labour" in the statute, which applies to both countries (*c*), a Scotch omnibus-owner has both liability to and insurable interest in his conductors, whereas an English owner has neither.

(*x*) *Henry Rifle Barrel Co.* v. *Employers' Liability Co.*, (Q. B. D. March 1884.)

(*y*) The *Times*, 18th July 1884.

(*z*) *Supra*, pp. 225 *et seq.*

(*a*) *Morgan* v. *London General Omnibus Co.*, 12 Q B. D. 201.

(*b*) *Wilson* v. *Glasgow Tramway Co.*, 5 C. S. C. (5th series) 981.

(*c*) 43 & 44 Vict. c. 42, s. 6 (3.)

CHAPTER XXVI. [465]

GUARANTEE INSURANCE.

Certain companies have been established in this country for undertaking the risks of suretyship for a pecuniary consideration. Their method of dealing is based on, and closely resembles, that of the ordinary insurance companies, and their bonds of suretyship are often termed policies.

Writing requisite.—A contract of guarantee by the Statute of Frauds must be in writing, it being a contract to answer for the debt, default, or miscarriage of another person (*a*), and it being also a promise to be answerable for a debt of, or a default in some duty by that other person towards, the promisee (*b*).

Not limited to fraud.—Where a bank manager allows overdrafts without security, and loss is occasioned thereby, this has in Lower Canada been held an irregularity within the meaning of a guarantee policy "against loss by the want of integrity, honesty, or fidelity, or by the negligence, defaults, or irregularities of the manager" (*c*). In the particular case the manager concealed the overdrafts by fictitious returns, and acted improperly in concert with the persons allowed to overdraw (*d*).

Concealment.—The ordinary rule of insurance law, that all material *circumstances known to the assured must be [* 466] disclosed, does not apply in the case of guarantee policies (*e*). The concealment to avoid the contract of guarantee must be fraudulent, for such policies come within the law of suretyship, and not of insurance.

Duty of assured.—A contract to guarantee a man from loss by a certain *employé* does not entitle the employer to run up an embezzlement bill against the surety, and keep dishonest servants at another man's risk, when once he knows or reasonably suspects their dishonesty (*f*). Nor may he alter the terms of the employment, if the policy was granted on the faith of them (*g*), otherwise he may (*h*).

Notice of default.—Consequently, it would seem that on default,

(*a*) See per Blackburn, J., *Steele* v. *M'Kinlay*, 5 App. Cas. 758–770, 43 L. T. 258, 29 W. R. 17.

(*b*) *Eastwood* v. *Kenyon*, 11 A. & E. 438. *Hargreaves* v. *Parsons*, 13 M. & W. 570.

(*c*) *Bank of Toronto* v. *European Assurance Society*, 14 Lr. Can. Jur. 186.

(*d*) See also *Byrne* v. *Muzio*, 8 L. R. Ir. 396.

(*e*) *N. British Insurance* v. *Lloyd*, 10 Ex 523, 24 L. J. Ex. 14.

(*f*) *Phillips* v. *Foxall*, L. R 7 Q. B. 666.

(*g*) *L. N. W. R.* v. *Whinray*, 10 Ex. 77, 23 L. J. Ex. 261.

(*h*) *Sanderson* v. *Aston*, L. R. 8 Ex. 73.

and notice thereof, the insurer would at any rate have the option to terminate the guarantee, and a right in equity to be discharged it the employer keeps on the *employe* after discovery of his defaults, for one of the surety's right on payment would be to insist on the discharge of the *employe* (*i*).

The default, &c, of which notice must be given is, it would seem, only such default, &c., as will found a claim on the guarantors (*k*). But this is a mere question of the construction of the particular instrument.

Right to dismal of employed.—The guarantor company can require dismissal for misconduct if the person guaranteed has the power to do so, which in guarantees of rate collectors and the like is not always possible, for a guarantee may be given to a collector-general, or the guardians of the poor, while the power to dismiss is [* 467] vested in another person or *body like the Treasury or Local Government Board or Board of Trade (*l*). Non-exercise of a power to suspend the employed vested in the holder of the policy will not avoid it (*m*).

Contents of guarantee policies.—Guarantee policies contain provisions as follows:—

1. That the employer shall give notice of any default or defalcation by the employed.

2. To forward any claim made in respect of the policy within a limited time.

3. A proviso that the company shall be entitled at the employer's expense to call for reasonable particulars and proofs of the correctness of the claim, and verification thereof by statutory declaration.

4. That only one claim may be made under a policy, and that only in respect of defaults, &c., committed within a month of the receipt of the notice (*n*).

5. That the policy is granted only on condition that the business of the employer, and the duties and salary of the *employe*, shall remain exactly as stated in the particulars of proposal.

6. That unless notice of anything making the actual facts to differ from the particular statements made shall be given to the insurers, and consent to the change be given by indorsement, the policy will be void.

7. That the employer shall, if reqired, aid (at the company's expense if a conviction be obtained) in prosecuting the *employe* to conviction, and at the company's expense give all infor- [* 468] mation and assistance *to enable the company to sue for and obtain the reimbursement by the employed, or his

(*i*) *Shepherd* v. *Beecher*, 2 Peere Wms. 289. *Phillips* v. *Foxall*, per Blackburn, J., L. R. 7 Q. B. 665, 680. *Burgess* v. *Eve*, 13 Eq. 450.

(*k*) *Byrne* v. *Muzio*, 8 L. R. Ir. 396, 408.

(*l*) *Lawder* v. *Lawder*, I. R. 7 C. L. 57. *Byrne* v. *Muzio*, 8 L. R. Ir. 396.

(*m*) *Byrne* v. *Muzio*, 8 L. R. Ir. 412. *Westport Union* v. *O'Malley*, 8 L. R. Ir. 412 note.

(*n*) Herein such policies differ widely from fire policies, where a dozen claims if they arise, can be made.

estate, of any moneys which the company shall have become liable to pay.

What conditions are precedent to payment.—So far as any of these conditions are for something to be done preliminary to the completion of the proof satisfactory to the directors, from which completion of proof the time of payment is to run, they are precedent. But those relating to matters to be done after payment are not and cannot be conditions precedent. The condition as to prosecution being a means of proving the employer's claim or loss is precedent, or can be so made (*o*).

But a condition that the employer shall give assistance to enable the company to obtain reimbursement from the employed, cannot be precedent to the obligation of the company to pay, since the company cannot be entitled to reimbursement until it has either paid or became liable to pay (*p*).

In a guarantee insurance, as the obligation of the surety is continuing, the obligation of the creditor or employer is also continuing, and any representation and understanding as to the trustworthiness of the employed, on which the contract was originally founded, continues till its termination (*q*).

Guarantee to guardians of poor.—Nor if the guarantee be given to the guardians of the poor will the guarantee company be exempt from liability on account of the negligence of the overseers in calling the collector to account (*r*).

**Representation as to mode of keeping accounts.*—A statement [* 469] by the employer as to the mode and times of examining the accounts of the principal for person employed, amounts to a representation of the course of business intended to be pursued, and must be so complied with (*s*), and the practice of examination must continue as stated, or any charge must be notified and assented to, or waived by the guarantee society. If a material change is made without the assent of the society, the policy will be invalidated (*t*).

The liability of the guarantors will be for all defaults of the *employe* within the period for which the guarantee is given, whether found out within the year or after its expiration, unless limited by apt words to defaults committed and discovered within the year (*u*).

Renewal of contract. Alterations in company's rules will not terminate contract.—Guarantee policies are usually made for a term of one or more years. It is sometimes stipulated that unless notice to terminate be given, the policy shall be treated as a renewal contract

(*o*) *London Guarantee, &c*, v. *Fearnley*, 5 App. Cas. 916, 43 L. T. 390, 28 W. R. 893, 6 L. R. Ir. 219, 232, 394.

(*p*). Same case.

(*q*) *Smith* v. *Bank of Scotland*, 1 Dow 272-293. *Phillips* v. *Foxall*, L. R. 7 Q. B. 666.

(*r*) *Guardians Mansfield Union* v *Wright*, 9 Q. B. D. 683.

(*s*) *Benham* v. *United Guarantee*, 7 Ex. 744, 16 Jur. 691, 21 L. J. Ex. 317.

(*t*) *Towle* v. *National Guardian*. 80 L. J. Ch. 900, 7 Jur. N. S. 1109, 5 L. T. N. S. 193, 10 W. R. 49, reversing 9 W. R. 649.

(*u*) *Fanning* v. *London Guarantee Co*, 10 Victoria L. R. 8.

of like nature and conditions (*v*). The effect of this is merely to continue the contract for a second term. At the end of that term, if no notice to continue is given, or other arrangement made, the policy drops. Alterations in the rules of the company, on the faith of which the assured took the guarantee (*w*), will not, however, have the effect of determining such a renewed contract if no notice to terminate has been given by either party (*x*), and the insurers will be entitled to the renewal premium.

Amalgamation.—Amalgamation with another company [* 470] will not affect *the validity of the renewal, whether it be within the powers of the company or not (*y*).

Where one of the conditions indorsed was that all guarantees, whatever might be the original term, should from the expiration of such original term be treated as a renewed contract of the like nature and conditions, unless either the member interested therein, or the board of directors, should give two calendar months' notice of an intention not to renew the same, it was held that the renewed contract was not itself to be deemed to contain this particular condition as to renewal, and that therefore even in the absence of notice the contract did not extend beyond one renewal. "A" renewal is one renewed contract (*z*).

Retirement of partner from guaranteed firm.—Guarantees on gross annual returns (*a*), floating risks or rent, are sometimes granted. When they are made to a partnership with a provision that the guarantee shall cease on death or retirement from business of any member, the retirement of a partner will avoid the guarantee, and the company cannot, it seems, affirm it and sue for the premium (*a*).

Subrogation of company.—A guarantee company issuing these policies is as a surety entitled to all the ways and means of the person guaranteed against the principal debtor (*b*).

Liquidator and receiver.—Liquidator under the Companies Acts may give, in lieu of the two sureties usually required, the guarantee of any society established by charter or Act of Parliament (*c*).

Receivers in the Court of Chancery have been, after [* 471] *some difference of opinion and practice, allowed to do the same (*d*).

No case on the point seems to have occured in the Queen's Bench Division, and the new Rules (*e*) prescribe that unless otherwise

(*v*) *Solvency Mutual Guarantee Co.* v *Froane*, 7 H. & N. 5, 31 L. J. Ex. 139.
(*w*) *Solvency Mutual Guarantee* v. *Freeman* 7 H. & N. 17.
(*x*) *Solvency Mutual Guarantee* v. *York*, 3 H &. N. 588, 27 L. J. Ex. 487.
(*y*) *King* v. *Accumulative Life*, 3 C. B. N. S. 151, 6 W. R. 12, 30 L. T. 119, 27 L. J. C. P. 57, 3 Jur. N. S. 1264.
(*z*) *Solvency Mutual, &c.*, v. *Froane*, 31 L. J N S. Ex. 193, 7 H. & N. 5.
(*a*) *Solvency Mutual Guarantee* v. *Freeman*, 7 H. & N. 17.
(*b*) Mercantile Law Amendment Act.
(*c*) Companies Act, 1862, General Rule 10.
(*d*) *Colmore* v. *North*, 27 L. T. N. S. 405, 42 L. J. Ch. 4, 21 W. R. 43. *Manners* v. *Furze*, 11 Beav. 30.
(*e*) Ord. l. r. 16.

ordered the person to be appointed receiver shall first give security to be allowed by the Court or a judge; such security to be by recognisance in the Form No. 21 in Appendix L. unless otherwise ordered.

Administrator pendente lite.—But there is little reason to doubt that the Chancery practice would be followed in the whole of the High Court, and in the Probate Division an administrator *pendente lite* who is a mere receiver has been allowed to offer this form of security, on the Court being satisfied that the bond proposed was in accordance with the rules prescribed by the constitution of the society. The security is certainly better than that of a private person (*f*).

(*f*) *Carpenter* v. *Queen's Proctor*, 7 P. D 235, 51 L. J. Prob. 91, 46 L. T. 821, 31 W. R. 108.

[* 472] *CHAPTER XXVII.

BANKRUPTCY.

Must notice of assignment have been given to defeat claim of trustees in bankruptcy?—Prior to the Bankruptcy Act, 1869, where the assured affected to assign a policy of life assurance for valuable consideration, the assignee for value would not have a good title as against the assignee in bankruptcy, unless he had given notice of the assignment to the insurance office, as the policy would in the absence of such notice be deemed to be in the order and disposition of the bankrupt, and pass to the assignee in bankruptcy accordingly, under the order and disposition clause of the statute (*a*), nor would the giving of notice be rendered unnecessary by the practice of the particular office not to take notice of assignments (*b*), and the notice must have been actual and not merely constructive (*c*).

Now, however, it is not necessary for the assignee for value of a policy of life assurance to give notice to the office in order to prevent the policy passing to the trustee in bankruptcy; because policies of assurance, being choses in action, are excepted from the operation of the order and disposition clause of the Bankruptcy Act, 1869 (*d*), and also from the like section of the Bankruptcy Act, 1883 (*e*).

Can claims arising out of insurance be proved in bankruptcy? [* 473] —Under the older Bankrupt Laws, demands payable *on a contingency could not be proved against the estate of the bankrupt, and this risk was held to apply to money assured by a policy of insurance; but a provision was inserted in the Bankruptcy Act, 1849, s. 174, enabling the assured in a policy of insurance to make a claim, and after the loss or contingency happened to prove and receive dividends, in like manner as if it had happend before the bankruptcy. Proof in a similar case would now have to be made under s. 31 of the Bankruptcy Act, 1869, the corresponding section in the Bankruptcy Act, 1883, being s. 37.

Proof for future premiums.—Proof for unpaid premiums must be made under s. 31 of the Bankruptcy Act, 1869, or under s. 37 of the Bankruptcy Act, 1883.

(*a*) *Williams* v. *Thorp*, 2 Sim. 268.
(*b*) *West* v. *Reid*, 2 Ha. 249.
(*c*) *Thompson* v. *Spiers*, 13 Sim. 469.
(*d*) Bankruptcy Act, 1869. s. 15, sub-s. 5. Ex parte *Ibbetson*, 8 Ch. D. 519 39 L. T. 1, 26 W. R. 848. Ex parte *Barry*, L. R. 17 Eq. 113, 43 L. J. Bkcy. 18.
(*e*) 46 & 47 Vict. c. 52, s. 44, sub-s. 8.

Proof by trustees.—Where policies were settled, proof by the trustees, after payment of the moneys assured, was allowed against the settlor's estate, for the premiums which the trustees had paid out of a fund provided for that purpose in case of the settlor's default to pay them (*f*).

Proof against company being wound up.—A holder of a policy of insurance in an insurance company which was being wound up was held entitled to prove for the sum which would be required to be paid to a similar solvent insurance company in order to give the policy-holder a policy for the same amount and under the same conditions (*g*).

Rights of creditor of assured having a security on the policy in case of bankruptcy.—A secured creditor may assess the value of his securities, and vote and prove in respect of the balance, and is bound to pay over to the trustee the amount which the security shall produce beyond the amount of such assessed value, and the trustee may at any time before realization of the security by the creditor, *redeem the security upon payment of the [* 474] assessed value. If the security prove to be more valuable than the amount at which it has been assessed, the trustee may either redeem it upon payment of such assessed value, or he may claim whatever surplus the security may produce over such assessed value.

The proof of the creditor, however, cannot be increased in the event of the security realizing a less sum than the value at which the creditor assessed it (*h*).

It would seem, therefore, that if a creditor has taken as security a policy of assurance, his most prudent course will be to realize it, otherwise should it increase in value during the bankruptcy, the gain will be the trustee's, while if it becomes less valuable the loss will be his own. In Ex parte *King* (*i*), a creditor for £1209 held as security a policy on the life of the debtor for £1200. He tendered a proof for his debt, stating that he held the policy as security, which he assessed at £200, its then surrender value. The trustee admitted the proof for the balance of the debt, being satisfied with the value put upon the security. Shortly afterwards, and before the close of the liquidation, the debtor died, and it was held by Bacon, C.J., that the trustee was entitled to the whole sum received on the policy beyond the £200 at which its value had been assessed.

Mortgage of policy receiving composition.—Where a creditor is secured by a policy and values it, and receives a composition for the rest of his debt in excess of his valuation, he has no claim on the

(*f*) Re *Miller*, Ex parte *Wordley*, 37 L. T. N. S. 38, 6 Ch. D. 790, 25 W. R. 881.

(*g*) Re *Albert Life Assurance Co*, L. R. 9 Eq. 707.

(*h*) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 40 G. R. 99, 100, 101, 136. 272.

(*i*) Ex parte *King*, Re *Palethorpe*, L. R. 20 Eq. 273, 44 L. J. Bkcy. 92.

policy beyond the amount of his valuation and interest thereon, together with the premiums he has paid on the policy (*k*).

[* 475] In this case a debtor by a composition *deed dated 4th November 1864, registered under the Bankruptcy Act, 1861, in consideration of a covenant on the part of himself and a surety to pay a composition of ten shillings in the pound, obtained a release from his scheduled debts by a statutory majority of his creditors. The deed contained a proviso that every secured creditor should have the full benefit and advantage of his security, and should be entitled to the composition after allowing for the value of such security. Amongst the secured creditors was one for £229 8*s.* 5*d.*, whose security was a policy of assurance on the life of the debtor. The creditor valued the policy at £16, and for the difference, namely, £213 8*s.* 5*d.*, he received the composition of ten shillings in the pound. The policy having fallen in after some premiums had been paid by the creditor, it was held that upon the construction of the deed the creditor upon the execution of the deed remained a creditor for £16 only, and that (the composition having been duly paid) the proceeds of the policy after payment of £16 and interest belonged to the debtor's estate, subject to repayment with interest to the creditor of premiums which he had paid.

To whom policy-money belongs when premiums paid by bankrupt.—Where a man after his bankruptcy pays the premiums on policies on his own life, effected and mortgaged by him before his bankruptcy, and his assignees in bankruptcy disclaimed any interest, and refused to pay the premiums, on his death his legal personal representatives, and not the assignees, are entitled to any surplus after the mortgagees have been paid (*l*). In this case the bankrupt had obtained his discharge on covenanting to pay so much a year to liquidate his debts, which covenant he had performed.

Though the case was argued on (24 & 25 Vict. c. 134, s. 154) a repealed Act, the principle seems clear independently of that Act.

[* 476] **Disclaimer by bankruptcy trustees. Payment of premiums by bankrupt mortgagor.*—If the trustees in bankruptcy disclaim, they cannot subsequently *ex post facto* claim again where they see a chance of profit (*m*). Where the mortgagor of a policy of insurance became bankrupt, but, notwithstanding his bankruptcy, continued to pay the premiums on the policy, it was held that the premiums so paid were in the nature of salvage moneys, and must be repaid to the legal personal representative of the mortgagor, he having died (*n*).

(*k*) *Bolton* v. *Ferro*, 14 Ch. D. 171, per Bacon, V. C. (1880), 49 L. J. Ch. 569, 42 L. T. 529, 28 W. R. 578. The composition was under the old Bankruptcy Act, 1861.

(*l*) Re *Learmonth*, 14 W. R. 6 8 (1866).

(*m*) Ex parte *Ibbetson*, 8 Ch D. 519, 39 L. T. 1, 26 W. R. 843.

(*n*) *Shearman* v. *British Empire Mutual*, 14 Eq. 4, 20 W. R. 620, 26 L. T.

Surety's position on bankruptcy of policy holder.—If a man becomes surety to keep up a policy and the principal becomes bankrupt, the surety cannot subsequently recover from the principal any premiums paid thereafter; for although such liability of the surety was contingent, it might have been proved in the bankruptcy (*o*).

Avoidance of voluntary settlement of policy.—Any settlement of property made by a trader—not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife—shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void as against the trustees in the bankruptcy; and shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void as against such trustee unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the *property comprising in such settlement (*p*). The [* 477] word "property" includes a policy of life assurance, the same being a chose in action (*q*).

The new Bankruptcy Act, 1883, contains a similar provision to the foregoing, but of a more extended operation, inasmuch as it applies to all settlements by whomsoever made, and not merely to those of a trader (*r*)

570, doubted in *Leslie* v. *French*, 23 Ch D. 552. See *Norris* v. *Caledonian*. 8 Eq. 127, 20 L. T. N. S. 939, 17 W. R. 954, and *Foster* v. *Roberts*, 9 W. R. 605, 7 Jur. N. S. 400.

(*o*) *Saunders* v. *Best*, 13 W. R. 160, 17 C. B. N. S. 731. Bankruptcy Act, 1869 s. 81; Bankruptcy Act, 1883, s. 37.

(*p*) Bankruptcy Act, 1869, s. 91.

(*q*) *Ibid.*, s. 4.

(*r*) 46 & 47 Vict c. 52, s. 47.

[* 478] *CHAPTER XXVIII.

THELLUSSON AND SUCCESSION DUTY ACTS.

Direction to pay premiums not accumulation within Act.—A direction or discretion in a will or deed to pay out of the testator's or settlor's property the premiums on a policy of insurance made or to be made upon the life of another is valid for the whole life insured, and is not an accumulation within the meaning of the Thellusson Act (39 & 40 Geo. III. c. 98) (*a*).

That Act only aims at dispositions for the accumulation of rents and profits as such, and not at dispositions having reference to bargains and contracts entered into for other purposes than the mere purpose of accumulation.

The benefit, if any, arising to an estate from a policy on which premiums have been paid for over twenty-one years arises not from accumulation, but from application and expenditure of income in obtaining a contract (*b*).

To insist that the policy must be dropped at the twenty-first year would be to say that what is construed for that purpose as an accumulation shall operate as a vain casting away of money. For a policy is evidence of a contract enforceable by forfeiture of previous payments, and the premiums could not be got back at the end of the twenty years.

[* 479] *A testatrix empowered her trustees, if they should see cause, to make insurances on the life of a nephew in such a way as to enable them to receive a sum or sums at his death, to be then applied for the purpose of the trust. She died in 1841. In 1845 the trustees insured the life of the nephew largely, and paid premiums out of the income of the estate till 1878, when he died. The next-of-kin claimed repayment of these premiums so far as paid after twenty-one years from testatrix's death as accumulations of income forbidden by the Thellusson Act, but the claim was refused (*c*).

Relation of predecessor and successor does not arise on policy.—By the Succession Duty Act (*d*), s. 17, "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the insured, or between the in-

(*a*) *Bassil* v. *Lister*, 9 Hare 177. *Halford* v. *Close*, W. N. 7th May 1883, p. 89 *Cathcart's Trustees*, 10 C. S. C. (4th series) 1205.

(*b*) *Cathcart's* v. *Heneage's Trustees*, *supra*. But see Jarman on Wills, vol. 1 (4th ed.), 816.

(*c*) *Cathcart's Trustees* v. *Heneage's Trustees*, 10 C. S. C. (4th series) 1205.

(*d*) 16 & 17 Vict. c. 51, s. 17.

surers and the assignee of the assured." Upon this section Sir George Jessel said (*e*): "No doubt there may be a gratuitous policy of insurance. But the words in s. 17 mean a policy effected in the ordinary way in consideration of a premium or premiums. If so, that is a contract for money, a purchase of a reversionary sum in consideration of a present payment of money, or, as is generally the case, on the payment of an annuity during the life of the person insuring. It is clearly a contract which could not be fairly described, as I read it, as a disposition of property at all, because a mere covenant to pay money is not a disposition of property in the ordinary sense. The insurance company does not die, and therefore a covenant to pay money on the death of some other person is a mere covenant to pay money. It is no disposition of the property of the insurance company or of any one else."

The reason for the exception suggested by Sir George *Jessel is that it was inserted *ex abundante cautelâ* to quiet [* 480] the fears of persons interested in insurance companies *ex cautelâ* (*f*). The clause extends to all policies, whether for the lives of the assured or not, including policies taken out by purchasers in reversion, but not policies so far as they were dealt with as property (*g*).

No duty on assigned policy.—No succession duty is due on policies of insurance assigned *inter vivos*, even where the assignment is made to a son as a means of liquidating a large amount of debt undertaken by him for his father (*h*).

(*e*) *Fryer* v. *Morland*, 3 Ch. D. 685.
(*f*) *Fryer* v. *Morland*, 3 Ch. D. 675, 685.
(*g*) 128 Hansard, 401, 1398.
(*h*) *Lord Advocate* v. *Earl of Fife*, 21 Sc. L. R. 151. *Fryer* v. *Morland*, 3 Ch. D. 675.



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